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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
Appellees.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

SANTA CRUZ DEVELOPMENT COMPANY, a Corporation,
Appellant,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLEES CORNELIUS C. WATTS AND DABNEY C. T. DAVIS, JR.

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BRIEF ON BEHALF OF APPELLEES CORNELIUS C. WATTS AND DABNEY C. T. DAVIS, JR.

Statement of Case.

These are appeals by one of the defendants below Santa Cruz Development Company, from the whole of the decree

entered in the above entitled action on November 1, 1915 (rec., pp. 542, 622) and by the defendants below, Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt from the portion of the decree that recognized the title of the plaintiffs below, appellees here, Cornelius C. Watts and Dabney C. T. Davis, Jr., to an undivided eighteen-nineteenths interest in the south half of the tract of land, the title to which is sought to be quieted herein, and to that portion of the decree that recognized the title of the defendants below, appellees here, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin to an undivided eighteen-nineteenths in the north half of said tract (rec., p. 541).

There are also appeals by the plaintiffs below, Cornelius C. Watts and Dabney C. T. Davis, Jr., and by the defendants below Jennie N. Bouldin, David W. Bouldin, Helen Lee Bouldin and the Santa Cruz Development Company from that portion of the decree which recognized the title of the defendants below, Joseph E. Wise and Margaret W. Wise, to an undivided one thirty-eighth interest each in the said tract of land (rec., pp. 539, 540); but these latter appeals have been dealt with in a separate joint brief by the appellants therein and will not be discussed in this brief which will be confined to the appeals first mentioned.

The action was commenced June 23, 1914, in the District Court of the United States for the District of Arizona by the filing of a bill of complaint to quiet title and remove cloud by Cornelius C. Watts and Dabney C. T. Davis, Jr., who alleged that by mesne conveyances they had succeeded to the title of the heirs of Luis Maria Baca to a tract of land situate in Santa Cruz County, State of Arizona, particularly described as follows:

> "Commencing at a point one mile and a half from the base of the Salero Mountain in a direction North forty-five degrees East of the highest point of said

mountain, running thence from said beginning point West twelve miles, thirty-six chains and forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links; and thence North twelve miles thirty-six chains and forty-four links to the place of beginning (rec., pp. 3–25).

By stipulation it was agreed that the answers of the several defendants below should have the force and effect of cross-bills, and they are to be considered on these appeals in that light (rec., p. 119).

The Santa Cruz Development Company denied that the deed from one John S. Watts to Christopher E. Hawley (rec., p. 28), one of the predecessors in title of Cornelius C. Watts and Dabney C. T. Davis, Jr., conveyed the land above described and claimed that the heirs of John S. Watts conveyed the said land to the predecessor in title of the Santa Cruz Development Company (rec., pp. 34, 35).

Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Graves, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt denied that John S. Watts conveyed the land to Hawley, and claimed that the heirs of John S. Watts had prior to the conveyance by them to the Santa Cruz Development Company conveyed an undivided two-thirds interest in said land to one David W. Bouldin under whom they claimed title. Joseph E. Wise and Margaret W. Wise denied that all the heirs of Luis Maria Baca conveyed their interests in said land to John S. Watts and claimed that there was a nineteenth heir, a son named Antonio, whose interest was not conveyed, and that they had succeeded by mesne conveyances to the title of said Antonio (rec., pp. 39, 60, 61, 115). Joseph E. Wise also claimed an interest by reason of an execution sale under a judgment against the administrator of David W. Bouldin (rec., pp. 67–70). Joseph E. Wise and Lucia J. Wise claimed certain particular tracts within the larger tract by reason of occupation and possession

under homestead entries or by enclosure, occupation and possession (rec., pp. 73, 78, 79).

Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin claimed that, if the deed from John S. Watts to Hawley did not convey the said tract of land, they had an undivided two-thirds interest in said land under the conveyance by the heirs of John S. Watts to David W. Bouldin prior in right to that claimed by Joseph E. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland C. Graves, Anna R. Wilcox and Eldredge I. Hurt; or, if the deed from Watts to Hawley did convey said land, that they had acquired title to the north half of said tract through the same line of title as Cornelius C. Watts and Dabney C. T. Davis, Jr. (rec., pp. 86, 88).

The decree (rec., pp. 536-539) was that the absolute title in fee simple to the whole tract of land was vested and thereby quieted in the plaintiffs Cornelius C. Watts and Dabney C. T. Davis, Jr., to the extent of an undivided eighteen-nineteenths of the south half of said tract, and in the defendant, Jennie N. Bouldin, to the extent of an undivided eighteen-thirty-eights of the north half of said tract, and in the defendant, David W. Bouldin, to the extent of an undivided eighteen-seventy-eixths of the north half of said tract, and in the defendant Helen Lee Bouldin, to the extent of an undivided eighteen-seventy-sixths of the north half of said tract, and in the defendant Joseph E. Wise, to the extent of an undivided one-thirty-eight of the whole of said tract and in the defendant Margaret W. Wise, to the extent of an undivided one-thirty-eighth of the whole of the said tract.

Statement of Facts.

Congress by the sixth section of the Act of June 21, 1860, provided:

> " That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract as is claimed by

> the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them; provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

On June 19, 1855, John S. Watts had presented to the Surveyor General of New Mexico as required by the Act of July 22, 1854, and the rules and regulations issued thereunder by the Secretary of the Interior, a petition on behalf of the surviving heirs at law of Luis Maria Baca in which he gave a list of such heirs (rec., 403); and the allegations of the petition were testified to be correct by witnesses who knew Baca and his family (rec., p. 405); and the surveyor general had reported to Congress that the claim of the petitioners to Las Vegas Grandes was valid and superior to that of the Town of Las Vegas which latter also appeared to be a valid grant but for the existence of the prior grant.

On June 17, 1863, John S. Watts as attorney for the heirs of Luis Maria Cabeza de Baca presented to the surveyor general of New Mexico a notice of the selection and location, " as one of the five locations " authorized by the said Act of June 21, 1860, of the tract of land particularly described (rec., p. 174), hereinafter referred to as the 1863 location.

On April 9, 1864, the Commissioner of the General Land Office approved the selection and location referring to it as Location No. 3, and ordered its survey (rec., p. 175).

No survey was made, however, until 1905 when Philip Contzen surveyed the land (rec., pp. 192, 378) which survey was approved and filed December 14, 1914, thereby for the

first time segregating the land from the public domain (rec., p. 193).

Prior to May 1, 1864, Jesus Baca y Lucero and his wife had conveyed to Jesus Maria Baca all their interest in the lands of Luis Maria Baca, deceased; Manuel Baca had conveyed to Tomas C. de Baca all the land the grantor might receive as heir of his deceased father, Luis Maria Cabeza de Baca ; Ignacio Baca and his wife had conveyed to Tomas C. de Baca the interest of Ignacio as heir of his deceased father, Ramon Baca, in the land of Luis Maria Baca, deceased (rec.. p. 174) ; and the heirs of Luis Maria Cabeza de Baca had given Tomas C. de Baca a power of attorney to convey the land in suit to John S. Watts (rec., 417).

On May 1, 1864, a number of persons describing themselves as descendants of Luis Maria Baca, by a deed to John S. Watts (rec., pp. 154–163) " for and in consideration of the services of John S. Watts for many years in and about the business of said heirs of Luis Maria Baca, as the attorney of said heirs, and for the further consideration of Three Thousand Dollars, paid by the said John S. Watts to Tomas Cabeza de Baca, our attorney in fact, have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said John S. Watts, of Santa Fe, New Mexico, and to his heirs and assigns forever, all our right, title and interest and demand in and to the following lands located upon by us as the heirs of Louis Maria Baca, under the 6th section af an Act of Congress approved June 21st, 1860 ", describing, among others, " Location No. 3 " by the courses and distances of the land above particularly described, and covenanting that they were seized in fee of the land and had good right and title to the same, that the land was free from incumbrances and that they had full power to sell and convey the same, that John S. Watts, his heirs and assigns, should quietly enjoy the land forever free from all claim of the said heirs of Luis Maria Baca, their heirs, executors and administrators, that the

grantors would warrant the title against all claims arising under them as heirs of Luis Maria Baca or under their heirs, executors and administrators, and that John S. Watts and his assigns should forever enjoy the land in as full and ample a manner as the heirs of Luis Maria Baca held and enjoyed the same just before the execution of the deed.

On April 30, 1866 (rec., pp. 176, 177) John S. Watts made application to the Commissioner of the General Land Office "to change the initial point so as to commence at a point three miles west by south from the building known as the Hacienda de Santa Rita," alleging that a mistake had been made in such initial point by reason of a want of a clear idea as to the direction of the different points of the compass due to a personal examination of the locality prior to the location having been prevented by the existence of war in that part of the Territory of Arizona and the hostility of the Indians.

On May 21, 1866 (rec., pp. 177, 178), the Commissioner of the General Land Office issued instructions to the surveyor general of New Mexico to cause a survey to be executed in accordance with the amended description, hereinafter referred to as the 1866 location.

On January 8, 1870 (rec., 193–196), John S. Watts made a deed to Christopher E. Hawley, wherein and whereby, for and in consideration of one dollar and other valuable considerations he "remised, released and quit-claimed * * * unto the said party of the second part, and to his heirs and assigns forever, all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing One hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D., 1864, bounded and described as follows: Beginning at a point three miles West by South from the build-

ing known as the Haciendo de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links; running thence east twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning. The said tract of land being known as Location No. 3 of the Baca Series, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

On January 13, 1870 (rec., p. 207) Christopher E. Hawley gave James Eldredge a power of attorney to sell, dispose of and convey " all of his right, title and interest in all that certain tract, piece or parcel of land containing one hundred thousand acres be the same more or less granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to John S. Watts of Santa Fe, in the Territory of New Mexico, by deed dated the 1st day of May, A. D., 1964, and by the said Watts conveyed to me (Christopher E. Hawley) by deed dated the 8th day of January 1970 " describing the land by the courses and distances of the 1866 location.

On May 30, 1871 (rec., pp. 197–207), a number of persons describing themselves as decendants of Luis Maria Baca, by deed to John S. Watts, "for and in consideration of the sum of six thousand and eight hundred dollars, paid by John S.

Watts to Tomas Cabeza de Baca, Agent and attorney in fact of the heirs of Luis Maria Baca, deceased," after covenanting that they were " the sole lawful heirs of Luis Maria Baca," that they were " siezed in fee of said land " and had " good right and title to the same and authority to sell and dispose of the same," that the said John S. Watts, his heirs and assigns, should " quietly enjoy the possession of said land free from all claims or demands of the said heirs of Luis Ma. Baca, their heirs, executors, administrators and assigns " and that they would " defend and protect the title of the said John S. Watts, his heirs and assigns, to the said lands against all claims and demands arising through or under us as heirs of the said Luis Maria Baca, deceased, or under persons claiming to be heirs of Luis Ma. Baca, deceased " ; and that the said John S. Watts, his heirs and assigns, should have and hold " said lands in as full, perfect and ample a manner as the said heirs of Luis Ma. Baca, deceased, had and held said lands just before the execution of said conveyance ", continued " and the said heirs of Luis Ma. Baca, above mentioned, now ratify and confirm the title made by us and by our attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1884, for the lands described in * * * Location Number Three, situate in Arizona Territory containing $99{,}289\frac{39}{100}$ acres, the boundaries of which are set forth and described in said deed ; And the said heirs of Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described."

On May 5, 1884 (rec., pp. 208–210) Christopher E. Hawley by James Eldredge as his attorney in fact conveyed to John C. Robinson " all his right, title and interest whatever the same may be in and to that certain tract of land situate, lying and being in the Santa Rita Mountains in the Territory of

Arizona, containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States, and by said heirs conveyed to John S. Watts of the Territory of New Mexico, by deed dated on the first day of May, 1864, and by said Watts conveyed to the said Christopher E. Hawley by deed dated on the eighth day of January, 1870," describing it by the 1866 location and continuing "The said tract of land being known as Location No. 3 of the Baca series, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, in and to the above described premises and every part and parcel thereof, with the appurtenances, including in this conveyance, all the rights and claims of the heirs of said Baca, or of those persons claiming under them, that is to say, all the right, title and interest of the said party of the first part to said location, or to any location elsewhere, under the Act of Congress approved June 21st, 1860, or under any decision of any Department of the government, made, or hereafter to be made, or Act of Congress passed, or to be passed."

On November, 19, 1892, John C. Robinson conveyed to Powhatton W. Bouldin and James E. Bouldin one-half of the tract of land describing it by the courses and distances of the 1866 location after which follows this sentence: "The said tract of land bounded and described in the sentence immediately foregoing, this being the northern half of the tract known as location number 3 of the Baca series."

On December 1, 1892 (rec., pp. 255-257), John C. Robinson conveyed to John W. Cameron "all his right, title and interest in and to that certain tract of land situate, lying and being in the County of Pima, Arizona Territory, the same being the southern half of the tract of land known as Baca

Float No. 3 " describing it by the courses and distances of the 1866 location.

On November 28, 1892, (rec., pp. 226-228), John W. Cameron executed a declaration of trust that he held the said southern half of Baca Float N. 3 in trust to dispose of the same in his discretion without any liability on the part of the purchaser to see the application of the purchase money, and to pay out of the proceeds derived from any disposition of said southern half of Baca Float No. 3, (1) to John C. Robinson ten per cent.; (2) to retain ten per cent. to be divided equally between him, John W. Cameron and Mrs. A. T. Belknap; (3) to hold fifteen per cent. pending a settlement between James Eldredge and Charles A. Eldredge, and (4) to pay the balance to James Eldredge or as he might in writing direct.

On September 22, 1893 (rec., pp. 210-212), John C. Robinson, after reciting the conveyance to Cameron of "that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3," and after reciting that Cameron held said land upon the trusts stated in the declaration of trust aforesaid including the payment to said Robinson out of the proceeds of sale when said land should be sold of ten per cent. of such proceeds, and the payment of a note for $250 endorsed by said Robinson, conveyed to Alex F. Mathews all his right, title and interest in and to the said land and to the proceeds thereof under said trust and directed the said Cameron to convey the said land to the said Mathews.

On September 22, 1893 (rec., pp. 220-223), John W. Cameron and Mrs. A. T. Belknap, after reciting the conveyance by Robinson to Cameron of "that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3" and after reciting that Cameron held said land upon the trusts stated in the declaration of trust aforesaid including the payment to Cameron and Mrs. Belknap of five per cent. each out of the proceeds of sale of said land when sold, con-

veyed all their right, title and interest in and to the said land and to the proceeds thereof to Alex. F. Mathews and directed the said Cameron to convey the said land to the said Mathews.

On September 22, 1893 (rec., p. 226), James Eldredge, after reciting the conveyance by Robinson to Cameron of " a certain tract of land in said county (Pima) and territory (Arizona) which is described as follows: viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3," and after reciting the trusts upon which Cameron held said land including the payment to said James Eldredge of a certain proportion of the proceeds of said land when sold, conveyed all his right, title and interest in said land and in the proceeds thereof to Alex. F. Mathews and directed the said Cameron to convey the said land to the said Mathews.

On September 22, 1893 (rec., pp. 223–226), Charles A. Eldredge, after reciting the conveyance by Robinson to Cameron of " a certain tract of land in said county (Pima) and territory (Arizona) which is described as follows, viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3 " and after reciting the trusts upon which Cameron held said land including the payment to said Charles A. Eldredge of fifteen per cent. of the proceeds of said land when sold, conveyed all his right, title and interest in said land and in the proceeds thereof to Alex. F. Mathews and directed the said Cameron to convey the said land to the said Mathews.

On September 25, 1893 (rec., p. 223), John W. Cameron after reciting the conveyance by Robinson to him of " a certain tract of land in said county (Pima) and territory (Arizona) being the southern half * * * of the tract known as the Baca Float No. 3 " and after reciting the trusts upon which he held said land, that the several trusts had been complied with and that the parties interested in the said land or its proceeds had assigned their interests to Alex. F. Mathews and had directed him to convey

said land to said Mathews, conveyed to said Mathews the land conveyed to Cameron by Robinson and described it as follows: " that certain tract of land situate in Pima County in Arizona Territory which is the southern one-half of the tract of land known as Baca Float No. 3."

Alex. F. Mathews died December 10, 1906 (rec., p. 149), leaving him surviving as his sole next of kin and heirs at law, his widow, Laura G. Mathews, his sons, Mason Mathews, Charles G. Mathews and Henry A. Mathews, and his daughter, Elizabeth P. Mathews.

Various proceedings were had in the land department in the endeavor to get a survey made; and the Secretary of the Interior finally decided, July 25, 1899 (rec., p. 182), that the application of John S. Watts of April 30, 1866 (rec., p. 176), was not an amendment of the location of June 17, 1863 (rec., p. 174), but was an attempt to re-locate the float after the expiration of the three years fixed by the statute as the time within which the selection and location must be made and that the action of the Commissioner of the General Land Office (rec., p. 177) purporting to grant the application was without authority and void and that the claimants must abide by the 1863 location.

On February 8, 1907 (rec., pp. 214–216), the heirs of Alex. F. Mathews conveyed to C. C. Watts and Dabney C. T. Davis, Jr., the appellees here,

> " all that certain tract or parcel of land and all their right, title and interest, both legal and equitable, therein, situate, lying and being in the Counties of Pima and Santa Cruz, in the Territory of Arizona, known as Baca Float No. 3, and granted to the heirs of Luis Maria Baca, by the United States, by the Act of Congress approved June 21, 1860, and afterwards conveyed by the said Baca heirs to John S. Watts by deed bearing date the 1st day of May, 1864, * * * and bounded and described as follows: Commencing at a point one mile and a half from the base of the

> Salero Mountain in a direction North, forty-five degrees East, of the highest point of said mountain, running thence from said beginning point West, twelve miles, thirty-six chains and forty-four links ; thence South twelve miles, thirty-six chains and forty-four links ; thence East twelve miles, thirty-six chains and forty-four links ; thence North twelve miles, thirty-six chains and forty-four links to the place of beginning * * * and said tract of land being known as Baca Float No. 3."

Upon the foregoing facts it is the contention of the appellees, Cornelius C. Watts and Dabney C. T. Davis, Jr., that, at the commencement of this suit, June 23, 1914, they were and that they now are the owners in fee simple absolute of the south half of the tract of land described in the foregoing paragraph and that they are entitled to have the clouds created on their said title by the several conveyances and transactions now to be stated removed and their title to said land quieted ; and it was to do this that this suit was instituted.

As to the Appellant, Santa Cruz Development Company.

Long subsequent to the deed from John S. Watts to Christopher E. Hawley (rec., p. 193) under which the appellees, Watts and Davis, derive title and on February 3, 1913 (rec., p. 412), the heirs of John S. Watts executed a deed to James W. Vroom purporting to convey the property particularly described in the next but one preceding paragraph ; and it is under this conveyance to Vroom that the appellant Santa Cruz Development Company claims.

As to the Appellants, Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt.

Subsequent to the deed from John S. Watts to Christopher E. Hawley (rec., p. 193), under which the appellees Watts and Davis derive title, and subsequent to all the deeds from the heirs of Luis Maria Baca to John S. Watts (rec., pp. 154, 197), and on January 14, 1878 (rec., pp. 261, 267), certain persons named Baca executed two papers purporting to remise, release and quitclaim to David W. Bouldin, in consideration of One dollar and "the further consideration as hereinafter expressed," the undivided two-thirds of all their right, title and interest in and to the Las Vegas grant or to the lands granted in lieu thereof, to wit: Locations Nos. 1, 2, 3, 4 and 5, describing location No. 3 by the courses and distances of the 1863 location; and in the same paper the said David W. Bouldin expressly agreed "in further consideration of the conveyance," at his own cost, to use his best efforts to perfect the title to the several tracts described in the paper, and he was given power as agent and attorney "to take possession," to collect any rent that might be due for use and occupation and to lease or sell and to execute all necessary papers.

Subsequent to the deed from John S. Watts to Christopher E. Hawley (rec., p. 193) under which the appellees, Watts and Davis, derive title, and on September 30, 1884 (rec., pp. 272, 282) the heirs of John S. Watts executed a paper purporting to convey by quitclaim to David W. Bouldin, in consideration of one dollar and "the further considerations, covenants and agreements to be performed by the party of the second part, as hereinafter mentioned, and for the purpose of compromising and settling the claims of title between the parties of the first and second part, and of perfecting and quieting the title

to the lands hereinafter described," the undivided two-thirds of the grantors' right, title and interest in and to several tracts of land including the tract involved in this suit, which is described by the courses and distances of the 1863 location, and in the same paper the said David. W. Bouldin expressly agreed, at his own cost, to use his best offorts and do whatever was necessary to perfect the title to said lands, and that " upon the final and complete settlement of the titles to said lands, and all matters connected therewith ", the grantors were to own and possess in fee an undivided one-third of any lands and money or other property that might be recovered ; and the said Bouldin was given power as agent and attorney to take possession, to collect the rents for any use or occupation that might be due, to compromise, mortgage, lease or sell said lands or any part thereof and to execute all necessary papers.

On February 21, 1885 (rec., p. 312), in consideration of two thousand dollars cash and a note for two thousand dollars payable on September 1, 1885, and " the further consideration and covenants and agreements to be performed by the parties of the second part hereinafter mentioned, in confirming and quieting title to the lands " David W. Bouldin conveyed to John Ireland and Wilbur H. King an undivided one-third of one-third of all the right, title and interest owned, controlled and possessed " by said Bouldin in the tract of land involved in this suit, describing it by the courses and distances of the 1863 location.

On November 12, 1892 (rec., p. 216), after reciting that the parties had exchanged deeds conveying each to the other an undivided half interest " in and to a certain tract of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona " described by the courses and distances of the 1866 location, " The said tract of land being known as Location Number Three (3) of the Baca Series ", David W. Bouldin, as attorney in fact for his sons, Powhatan W.

Bouldin and James E. Bouldin, under powers of attorney (rec., p. 432), granted, assigned, released and confirmed to John C. Robinson, one-half of the described premises, describing the half conveyed by the courses and distances of the 1866 location and concluding the description " The said tract of land, bounded and described in the sentence immediately foregoing this, being the Southern half of the tract known as Location Number Three (3) of the Baca Series."

On March 13, 1893, a suit was brought in the District Court for the First Judicial District of the then Territory of Arizona (rec., pp. 456–466) by John Ireland and Wilbur H. King against David W. Bouldin and an attachment issued and levied on the tract of land involved in this suit describing it by the courses and distances of the 1863 location. The complaint alleged that the defendant, on March 22, 1888, gave plaintiffs a promissory note for five thousand dollars payable one year after date in consideration of the plaintiffs giving defendant a title bond for one-third of one-third of said tract of land. April 9, 1895 (rec., pp. 500–512) Leo Goldschmidt filed in the Probate Court of Pima County, Arizona, a petition alleging the death in January 1895 of David W. Bouldin leaving property in Pima County and as his heirs P. W. Bouldin and another son, both of age; and on April 20, 1895, on such petition Goldschmidt was appointed administrator. On May 2, 1895 (rec., pp. 468-470) judgment was entered in the action in the District Court reciting the death of defendant, that Goldschmidt had been appointed administrator and become a party to the action, presentation to and rejection by him of the claim and that the case was tried before the court without a jury, and finding all the issues in favor of the plaintiffs and decreeing the sale of the defendant's interest in the land as it existed March 14, 1893. On July 31, 1895 (rec., pp. 472–474), Lyman W. Wakefield, as sheriff of Pima County, sold to Wilbur H. King the interest of the administrator in the land as it existed at

the time of the sale, July 31, 1895, and on January 16, 1899 (rec., p. 515), the said sheriff executed a deed to King of the interest sold. While the case at bar was pending in the United States District Court for Arizona, and on September 30, 1914, the appellant Joseph E. Wise made an *ex parte* application (rec., pp. 480–534) to the Superior Court of the State of Arizona for the County of Pima as the successor of the District Court for the First Judicial District of the Territory of Arizona, and procured a decree directing John Nelson, then sheriff of Pima County, to execute a deed to said Wise conveying " all the right, title and interest which said David W. Bouldin had on said 14th day of March, 1893, in and to Baca Float No. 3, now situate in the County of Santa Cruz, State of Arizona."

On February 7, 1894 (rec., p. 229) Powhatan W. Bouldin and his wife and James E. Bouldin, after reciting the conveyance by David W. Bouldin as attorney in fact for them to John C. Robinson of " the lower or southern one-half of a tract of land known as Location No. 3 of the Baca Series in the Santa Rita Mountains," conveyed to Alex. F. Mathews that certain tract of land situated in Pima County in Arizona Territory which is " the southern one half of the tract of land known as Baca Float No. 3," describing it by the courses and distances of the 1866 location.

On February 7, 1894 (rec., p. 219) John Ireland and Wilbur H. King conveyed to Alex. F. Mathews " all of their rights, title and interest, under and by virtue of a deed executed to them by David W. Bouldin, Sr., dated February 21st, 1885 * * * in and to * * * the southern one-half of the tract of land known as Baca Float No. 3," describing it by the courses and distances of the 1866 location.

On April 8, 1907 (rec., p. 323) Mrs. A. M. Ireland, widow of John Ireland, conveyed to Joseph E. Wise " all the right, title, interest, claim and demand which the said party of the first part has in and to the following described real estate and

property situated in the County of Santa Cruz and Territory of Arizona, to-wit: That certain private land claim known as and called 'Baca Float or Location No. 3'", describing it by the courses and distances of the 1863 location.

On April 24, 1907, (rec., p. 320) Wilbur H. King conveyed to Joseph E. Wise by the same description as in the deed from Mrs. Ireland to Wise before quoted and adding "And also all the right, title, interest acquired by said Wilbur H. King under and by virtue of a certain Sheriff's Sale by the Sheriff of Pima County, Arizona Territory, under a judgment rendered on May 2d, 1895, by the District Court of the First Judicial District of the Territory of Arizona in and for Pima County in favor of John Ireland and Wilbur H. King and against Leo Goldschmidt, Administrator of the Estate of David W. Bouldin, deceased.

In the foregoing statement of facts no mention has been made of the various deeds under which the appellant, Joseph E. Wise, and the appellee, Margaret W. Wise, claim to have succeeded to the title of Antonio Baca, the alleged nineteenth heir of Luis Maria Baca, who it is claimed did not join and was not represented in the deeds from the heirs of Luis Maria Baca to John S. Watts, for the reason that they are discussed in a separate joint brief filed on behalf of the several parties appealing from the portion of the decree as to the said Antonio, and also for the reason that this brief is presented on behalf of the appellees, Watts and Davis, alone in support of their claim to have succeeded to the title of John S. Watts.

Having conveyed their interest by the deeds of May 1, 1864, and May 30, 1871, the heirs of Baca had nothing to convey when the instruments of January 14, 1878, to Bouldin were executed. Similarly since John S. Watts had conveyed his interest to Hawley January 8, 1870, his heirs had nothing to convey when they executed the instruments to Bouldin on September 30, 1884. Consequently Bouldin conveyed nothing to Ireland and King by the deed of February 21, 1885; and

whatever interest David W. Bouldin acquired afterwards from Robinson he conveyed to his sons Powhatan W. Bouldin and James E. Bouldin by the deed of October 16, 1888. Whatever interest the sons acquired in the south half of Baca Float No. 3 was conveyed to John C. Robinson November 12, 1892, so that on March 13, 1893, when the Ireland-King suit was brought and the attempted attachment levied, David W. Bouldin had no interest to attach. Certainly nothing was conveyed by the sheriff under the sale of the administrator's interest as of July 31, 1895, under which Wise claims ; even, if the *ex-parte* proceedings pending the suit be considered.

John S. Watts having conveyed the property to Christopher E. Hawley by the deed of January 8, 1870, his heirs could not and did not convey anything to James W. Vroom by the deed of February 3, 1913, under which the Santa Cruz Development Company claims.

POINTS.

I.

The United States District Court for the District of Arizona had jurisdiction of the case.

In *Lane v. Watts*, 234 U. S., 525, the Supreme Court held that the title to the 1863 location passed to the heirs of Baca and out of the United States April 9, 1864, but that the survey was essential, as said in Stoneroad v. Stoneroad (158 U. S., 240, 247), to segregate the land from the public domain and finally fix the rights of the owners of the grant.

When the suit was filed the appellees, Watts and Davis, had the legal title to the 1863 location and were in possession though possibly not rightfully so technically.

While as a precautionary measure the bill in this case was

not filed until after the decision of the Supreme Court was handed down, the said appellees did not file the bill in reliance upon the decision of the Supreme Court.

The bill was filed to quiet title under the rule which permits the filing of such a bill in a case within the Arizona statute, provided that the facts exist which permit a Federal equity court to take jurisdiction as is claimed to be the case here.

The Arizona Statute, Section 1623 of the Revised Statutes (1913) provides that

> "An action to determine and quiet the title to real property may be brought by anyone having or claiming an interest therein, whether in or out of possession, against any person * * * when such person * * * claims any estate or interest adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought."

The scope of this statute has been passed upon in this jurisdiction in the following cases:

Ely v. N. M. & A. Ry. Co., 2 Ariz., 420; Reversed, 129 U. S., 291.
Bishop v. Perrin, 4 Ariz., 190.
Jordan v. Duke, 6 Ariz., 455.
Oliver v. Dougherty, 8 Ariz., 65.

It is also very similar to the Nebraska statute which was considered in *Holland v. Challen*, 110 U. S., 15; the Iowa statute which was considered in *Whitehead v. Shattuck*, 138 U. S., 146, and in *Wehrman v. Conklin*, 155 U. S., 314; and the Statute of Utah, which was considered in *Lawson v. U. S. Mining Co.*, 207 U. S., 1.

The rule to be deduced from these cases is that if the facts exist which give a Federal equity court jurisdiction, that is, that plaintiff has no adequate remedy at law, the state

statutes will be treated as "an enlargement of equitable rights * * * although presented in the form of a remedial proceeding" (*Lawson v. U. S. Mining Co., supra*, p. 9).

In *Lawson v. U. S. Mining Co., supra*, the Court quoted with approval *Holland v. Challen, supra*, in which it was held that a suit in which the provisions of the Nebraska statute would be applied, might be brought by one out of possession against another, also out of possession. In the *Lawson case*, both parties were in possession and consequently the plaintiff could not bring ejectment proceedings and therefore had no adequate remedy at law, which was the criterion which determined the jurisdiction of the Federal equity court.

In other words, in an action to quiet title under state laws, similar to that of Arizona, it must affirmatively appear from the bill either that both plaintiff and defendant are out of possession, or that the plaintiff is in possession, when it is immaterial whether the defendant is in or out of possession (*Stockton v. Oregon Short Line R. Co.*, 170 F., 627, 629).

Foster in his *Federal Practice*, 5th Ed., v. 1, p. 343, says:

> "SECTION 82. State laws creating new rights are enforced by the Federal Courts either at law or in equity
> * * * * * * *
>
> A Federal Court of Equity will follow a State Statute authorizing a person in possession of land and unmolested (*Clark v. Smith*, 13 Pet., 195; *U. S. Min. Co. v. Lawson*, 134 F., 769, aff'd 207 U. S., 1; *N. C. Min. Co. v. Westfeldt*, 151 F., 290; *Kraus v. Congdon*, 161 F., 18); or even one out of possession of vacant land (*Holland v. Challen*, 110 U. S., 15; *S. P. R. Co. v. Stanley*, 49 F., 263; *Field v. Barber Asphalt Co.*, 117 F., 925; *Smith Oyster Co. v. Darbie, etc.*, 149 F., 555; *Frost v. Spitley*, 121 U. S., 557), to maintain a bill to determine in equity title to the same or to recover possession thereof; but not a state statute authorizing one out of possession of land without a trial by jury to obtain possession of the same when occupied by an adverse claimant (*Whitehead v. Shattuck*, 138 U. S., 146;

Wehman v. Conklin, 155 U. S., 314, 325; *Gibson v. Cook*, 124 F., 986; *Union P. Co. v. Cunningham*, 173 F., 90) ".

See also :

Am. Ass'n v. Williams, 166 F., 17.
Woods v. Woods, 184 F., 159.
Klenk v. Byrne, 143 F., 1008.
N. Y., N. H. & H. R. Co., 188 F., 10.

In a note to the foregoing section the author says :

> " It is held that a bill is demurrable when it fails to allege affirmatively either that the plaintiff is in possession of the land or that both plaintiff and defendant are out of possession."

citing *L. P. R. Co. v. Goodrich*, 57 F., 879.

The last case is cited approvingly in

Blythe v. Hinckley, 84 F., 234 ; 92 F., 239 ;
U. S. Min. Co. v. Lawson, 115 F., 1008 ;
Johnson v. Carson Gold Min. Co., 157 F., 154 ;
Buchanan Co. v. Adkins, 175 Fed., 701 ; and

In *Baum v. Longwe*, 200 F., 451 (D. C. N. Mex., Oct. 23, 1912, POPE, D. J.), the reason of the holding in these cases is that the Federal Courts have no jurisdiction in equity if there exists an adequate remedy at law and no state can confer such jurisdiction.

See also

Graves v. Ashburn, 215 U. S., 331, 334.
Simmons Case Co. v. Doran, 142 U. S., 417, 449.
Reynolds v. Crawfordsville Bk., 112 U. S., 405, 410.
Sayer v. Burkhardt, 85 F., 246; Cert'd. 172 U. S., 649.
Cooke v. Copenhauer, 126 F., 145.
Morse v. Smith, 80 F., 206.
Morrison v. Marker, 94 F., 697.
Rummer v. Butler Co., 93 F., 304.

A court of equity has an inherent power to remove a cloud on title (*Shelton v. Morrell*, 134 S. W., 988) and this independ-

ent of the state statute which merely enlarges the powers of the equity court (*Siedschlag v. Griffon*, 112 N. W., 18; *Hodgskin v. Boswell*, 110 Pac., 487; *King Lbr. Co. v. Sprague*, 58 So., 920); but primarily such an action comes within the general equity jurisdiction (*Van Houten v. Van Houten*, 68 N. J. Eq., 358; 59 Atl., 555).

In the latter case the complainant had paid the whole consideration and plaintiff had executed a deed to certain land reserving a life estate to himself. About twelve years afterwards he sued to have the deed set aside on the ground that provision for revocation had been omitted. It was held that the suit was under the general equity jurisdiction and not under the statute to quiet title.

In *Chicago Term. R. R. Co. v. Barrett*, 252 Ill., 86, 94; 96 N. E., 794, it was held that a bill to quiet title is entertained in equity because a party is not in a position to force the holder of property, or one claiming adverse title, into a court of law to test its validity.

The following cases support the right to maintain a suit to quiet title under a State Statute in the Federal Court:

Johnson v. Kramer, 203 F., 733, 741.
Smith Oyster Co. v. Darber, 149 F., 555.
U. S. v. Leslie, 167 F., 670.

And it has been held to be "only necessary that the plaintiff should have some kind of estate in the property in controversy, legal or equitable, and that his title should be paramount to that of the defendant (*Wilson v. Bombeck*, 134 Pac., 382, 386 [Sup. Ct. Okla., 7/22/13], citing numerous Kansas cases); that a purchaser at an execution or judicial sale may bring such suit (*Copper Bell M. Co. v. Gleason*, 14 Ariz., 548, 552; 134 Pac., 285).

The statutes providing for actions to quiet title held to be enabling ones, and to be liberally construed (4 *Pom. Eq.*, sec. 1397; Armour v. Frey, 161 S. W., 829, 837).

Having acquired jurisdiction, equity will retain control to dispose of all the questions between the parties affecting this land.

Miller v. Edison El. Illuminating Co., 184 N. Y., 17.

Cooper & Evans Co. v. Manhattan Bridge Three Cent Line, 164 App. Div., 64.

Robbins v. Clock, 59 Misc., 289 (Aff'd without opinion, 131 App. Div., 917; aff'd without opinion, 203 N. Y., 603).

In *Reich v. Cochran*, 213 N. Y., 416, the Court said (p. 423):

> "In my view of the case enough has been said to demonstrate that the plaintiff is rightfully in equity. If so, the court undoubtedly has jurisdiction to make a complete determination of the matters in controversy between the parties."

Prior to and at the commencement of this suit the appellees, Cornelius C. Watts and Dabney C. T. Davis, Jr., were in possession of the land the title to which it is sought to have quieted in them and from which it is sought to have the clouds removed (rec., 231).

II.

The deed, dated January 8, 1870, from John S. Watts to Christopher E. Hawley conveyed the land involved in this suit.

The decision in this case turns on whether the deed from Watts to Hawley (rec., p. 193) conveyed the land selected and located on June 17, 1863, which is described in paragraph 2 of the bill of complaint (rec., p. 4), and which is known in this case as the 1863 location.

No question is made that all the heirs of Luis Maria Baca joined in either the deed of May 1, 1864 (rec., p. 154), or in that of May 30, 1871 (rec., p. 197), if Antonio be left out of consideration, which is done in this brief, since his claims are discussed in a separate brief; and the United States Supreme Court has decided in *Watts v. Lane*, 234 U. S., 525; s. c., 235 U. S., 17, that the title to the 1863 location vested in the heirs of Baca on April 9, 1864.

If the deed to Hawley conveyed this land and the deed of May 30, 1871, inured to his benefit, then the various grantors in the conveyances under which the appellants, Joseph E. Wise and Lucia J. Wise, and the Santa Cruz Development Company, claim had at the time of the several conveyances nothing to convey; and the attachment proceedings were void.

The deed to Hawley (rec., p. 193) reads as follows:

> " do remise, release and quitclaim unto the said party of the second part (Hawley) and to his heirs and assigns forever, All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part (Watts) by deed dated on the 1st day of May A. D., 1864, Bounded and described as follows: Beginning at a point three miles West by South from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links; running thence East twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Series.

> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances; To have and to hold all and singular the above mentioned and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

It is contended on behalf of appellants that the property conveyed by said deed is that described by the courses and distances of the 1866 location which would include only a small portion of the 1863 location to which this suit relates. On behalf of the appellees, Watts and Davis, it is contended that the intention of the parties was to convey and the deed did convey the land granted by the United States to the heirs of Luis Maria Baca and by the said heirs conveyed to John S. Watts, that is the 1863 location to which this suit relates.

There is no attempt here to reform or correct the said deed but to have the Court find, as a preliminary to quieting the title to said land in appellees, Watts and Davis, that, under the existing facts known to both parties, the relations of the parties to each other and to the subject matter, the circumstances under which said deed was executed, and the subsequent conduct of the parties, the parties intended to and did convey the land described in the second paragraph of the bill, just as in the case of *Watts v. Lane*, *supra*, the United States Supreme Court found, as a preliminary to decreeing that the land department had lost jurisdiction over this land, that the title passed out of the United States and to the heirs of Baca and yet held that it was not trying title to land.

It is a primary canon of interpretation that the intention of the parties controls, if to do so violates no rule of law.

Reeds v. Proprietors of Locks & Canals, 8 How., 274.
Newson v. Pryor, 7 Wheat., 7, 10.
Holmes v. Trout, 7 Pet., 171.
St. Louis v. Rutz, 138 U. S., 226, 243.
St. Clair Co. v. Lovingston, 23 Wall., 46.
Meredith v. Picket, 9 Wheat., 573.
McKey v. Hyde, 134 U. S., 84, 95.
Morris v. United States, 174 U. S., 196, 246.
Reloj Cattle Co. v. United States, 184 U. S., 624, 637.
Ainsa v. United States, 161 U. S., 208.
Ely v. United States, 171 U. S., 220.
United States v. Maish, 171 U. S., 242.
Perrin v. United States, 171 U. S., 292.

In *Cavazos v. Trevino*, 6 Wall., 773, the court held that in construing a grant the circumstances attendant at the time it was made are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the papers which were possessed by the actors themselves.

In *Hollingsworth v. Fry*, 4 Dall., 345, the court says (p. 347):

> "The great rule of interpretation with respect to deeds and contracts is to put such a construction upon them as will effectuate the intention of the parties if such intention be consistent with the principles of law."

In United States v. Gibbons, 109 U. S., 200, the court says:

> "Where the language is susceptible of two meanings the court will infer the intention of the parties and their relative rights and obligations from the circumstances attending the transaction."

In Rock Island Railway v. Rio Grande Railroad, 143 U. S., 596, the court says (p. 609):

> "In the interpretation of any particular clause of a contract the court is not only at liberty but required to examine the entire contract and may also consider the relations of the parties, their connection with the subject matter and the circumstances in which it was signed."

In Vance v. Anderson, 113 Cal., 532, 45 Pac., 816, the court says (p. 538):

> "Equity * * * shapes its relief in such a way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, and their relation to one another and to the subject matter are subjects for consideration." Citing *Campbell v. Freeman*, 99 Cal., 34 Pac., 113; *Peirce v. Robinson*, 13 Cal., 116; *Locke v. Moulton*, 96 Cal., 21, 30 Pac., 957; *Ross v. Bruisse*, 64 Cal., 245, 30 Pac., 811; *Taylor v. McLain*, 64 Cal., 513, 2 Pac., 399.

In *Sadler v. Taylor*, 38 S. E., 583, the court says (p. 590):

> "In ascertaining what the intention of the parties was at the inception of the transaction it is proper to consider the parole declarations of the parties and the evidence of other witnesses together with the situation, circumstances and conduct of the parties respecting such transaction prior to, at the time of and after the execution of the deed."

Wherever possible the real intention of the parties is to be gathered from the whole description including the general description as well as the particular description.

Devlin on Deeds, 3d Ed., v. 2, sec. 1039.
Brunswick Sav. Inst. v. Crossman, 76 Me., 577, 580.
Sumner v. Hill, 47 So., 565, 567.
Stevenson v. Yoho, 59 S. E., 954, 956.
Adams v. Atkinson, 20 W. Va., 480.

The intention is the controlling element in the construction of a deed.

Tiernan v. Jackson, 5 Pet., 580.
Stanley v. Colt, 5 Wall., 119, 166.
Calhoun Co. v. Am. Emigrant Co., 93 U. S., 124.
Pawlet v. Clark, 9 Cr., 292, 330.
Brown v. Jackson, 3 Wh., 449.
Reed v. Props. Locks & Canal, 8 How., 274, 288.
Steinbach v. Stewart, 11 Wall., 566.
Phila., etc., R. Co. v. Howard, 13 How., 307.
Irvin v. United States, 16 How., 513.
Williams v. Paine, 169 U. S., 55, 76.
Hughes v. Edwards, 9 Wh., 489, 494.
Hollingsworth v. Fry, 4 Dall., 345.
United States v. Arredondo, 6 Pet., 691, 740.

Other cases supporting the same principles are :

Mauson v. Bullus, 16 Pet., 528, 533.
United States v. Peck, 102 U. S., 64, 65.
Atkinson v. Cummins, 9 How., 479, 486.
Good v. Martin, 95 U. S., 90, 95.
Burdell v. Denig, 92 U. S., 716, 722.
Roy v. Simpson, 22 How., 341, 350.
The Confederate Note Case, 19 Wall., 548, 549.
Bell v. Bruen, 1 How., 169.
Montana Min. Co. v. St. Louis Min. Co., 204 U. S., 204, 214.
Mobile, etc., R. Co. v. Jurey, 111 U. S., 584.
Merriam v. United States, 107 U. S., 437, 441.
Canal Co. v. Hill, 15 Wall., 94.
United States v. Granite Co., 105 U. S., 35, 39.

Under the foregoing principles, what were the surrounding circumstances of the making of the deed by Watts to Hawley which the Court below was to consider in ascertaining the intention of the parties ?

John S. Watts was an intimate of Tomas Cabeza de Baca the grandson of Luis Maria Baca and for a long while the agent of the heirs of said Baca in connection with a number

of the grants to him from the Mexican government and made his home at the house of said Tomas (rec., pp. 351, 353). The said Tomas employed Watts to perfect the title of said heirs and furnished the information on which Watts acted (rec., p. 375). Watts presented the petition for the confirmance of the Las Vegas grant on behalf of said heirs to the surveyor general of New Mexico under the Act of July 22, 1854 (rec., p. 403); conducted the proceedings in which said heirs waived their claim to the Las Vegas grant in consideration of a grant by Congress of a like amount of public land elsewhere and as a result of which the Act of June 21, 1860, was passed authorizing said heirs to select and locate in lieu of the Las Vegas grant an equal quantity of vacant land, not mineral, in the Territory of New Mexico, in square bodies not exceeding five in number (rec., pp. 403–409).

Here is where the use of the word "Float" to designate the property arose. To those dealing with the public lands the term "Float" is a familiar one. It is a term applied to a grant of land by the government, the particular tract of land itself not having been yet determined, that is, a general grant of a certain amount of lands to be selected by the grantee, and attaches to no specific tract until the selection is actually made "in the manner prescribed by law," which in this case included notice to the surveyor general of the selection and location describing it by reference to natural objects, the approval of the surveyor general and by the Commissioner of the General Land Office and finally in order to segregate the land from the public domain the survey by authority of the land department and the approval and filing of such survey (*Watts v. Lane*, 235 U. S., 525, 541; *Stoneroad v. Stoneroad*, 158 U. S., 247). The number "*three*" was added by the land office because it was the *third* of the *five locations* to be selected.

Nelson v. N. P. R. R. Co., 188 U. S., 108;
Wisconsin Central R. Co. v. Price Co., 133 U. S., 496;

United States v. McLaughlin, 127 U. S., 428;
Grinnell v. Railroad Co., 103 U. S., 739;
Railway Co. v. Railroad Co., 112 U. S., 414;
Railroad Co. v. Herring, 110 U. S., 27;
Elling v. Thexton, 7 Mont., 330, 339; 16 Pac., 931, 934;
Corvallis & E. R. Co. v. Benson, 61 Ore., 359; 121 Pac., 418, 425;
Words & Phrases, v. 3, p. 2850.

The said John S. Watts represented New Mexico in Congress as a delegate and was judge of the Supreme Court of the Territory (rec., p. 297). He undoubtedly prepared the deeds from the heirs of Baca to himself. He knew that no survey had been made of the land and that until a survey had been made by proper authority Baca Float No. 3 was tied to no particular tract of land. On March 2, 1863, he had made a title bond to William Wrightson wherein he stated that he was the owner of one of the unlocated floats, that he had full authority to make the location of said float for the Baca heirs and to cause to be made a title in fee simple for the same and whereby he sold for a valuable consideration to Wrightson the unlocated float and bound himself, "his heirs, executors, administrators and assigns to make a full and complete title to said Wrightson, his assigns or legal representatives whenever thereunto required" (rec., p. 183).

When this bond was offered in evidence the Santa Cruz Development Company and Joseph E. Wise and Lucia J. Wise objected to its introduction on the grounds (1) that the execution thereof by John S. Watts had not been proved; (2) that it was not acknowledged in due form or before a recognized officer; (3) that there is nothing in the paper to connect it with the 1863 location of Baca Float No. 3; (4) that there is no allegation in the bill of the assignment of the bond; (5) that the assignment is of a beneficial power in trust, and, not having been exercised by Wrightson but by

Watts, did not inure to Wrightson or his assigns ; (6) that it could not be used to assist in the construction of a deed, made even in pursuance of the contract, unless the action was to reform the deed ; and (7) that it tended to alter, vary or modify the deed (rec., p. 185).

It was received subject to the objections and later a motion to strike it out was overruled (rec., pp. 186, 455).

Samuel A. M. Syme testified that the bond was among the papers received from James Eldredge and had been in his (Syme's) possession, or in that of Alex. F. Mathews, for many years when he turned it over to the appellees Watts and Davis at the time they acquired the property (rec., p. 187).

Christopher E. Hawley, by James Eldredge as his attorney in fact, conveyed to John C. Robinson, from whom Mathews and Syme acquired title, so that presumably the title bond had been in Hawley's possession, since, as said by the Court in *Lynch, Adm'r, v. Johnson*, 12 Ky., 98, at page 105 :

> " As to the bonds on the proprietors, it is evident that they were delivered by Johnson to them since most, if not all of them, are filed in the cause."

The fact that this title bond is found among the title papers passed along by the several grantors from Hawley to the appellees Watts and Davis, raises a like presumption.

A title bond may be assigned by delivery as well as by a written assignment.

In *Bullion v. Campbell*, 27 Tex., 653, the Court said (p. 656) :

> " The contract upon which the suit was brought was not in writing (referring to the title bond). * * * The assignment of the bond which was in parol was not the contract which it could properly be said they were seeking to enforce and must be regarded in view of the facts in this case as merely the transfer to Campbell and Strong of the obligation or contract between

> the original parties and not as of itself the contract conveying the land. * * * "

And in *Robinson v. Williams*, 40 Tenn., 539 (3 Head), the Court said (p. 542) :

> " The transfer of a title bond may as well be by simple delivery as by an assignment in writing."
> See *Lynch, Adm'r v. Johnson*, 12 Ky., 98.

By the use of the word " assigns " in the bond John S. Watts evidently contemplated that the bond would be assigned and that he would convey directly to such assignee ; and he in terms bound himself to " make a full and complete title " to such assigns.

This bond found among the title papers in the possession of the appellees, Watts and Davis, tends to show the relations of the parties, their connection with the subject matter and the circumstances under which the deed from Watts to Hawley was executed and taken in connection with the language of the entire description makes it clear that it was the intention of the parties to convey and that the deed did convey the 1863 location. That the bond does not identify which of the *five* floats it referred to is immaterial since no claim is made nor evidence introduced to show that it referred to any of the other four.

Both parties knew that the grant was still a " Float," that no survey had been made by the proper government officials to tie it to a specific tract of land, and that what Watts could convey and what Hawley expected to get was the grant from the United States to the heirs of Luis Maria Baca.

The Court below, therefore, correctly held that (rec. p.) :

> " The rule to be followed by a court of equity in construing a deed is that the real intent of the parties must be gathered from the whole transaction, including the general as well as the particular description, which

> should be construed so as to give effect to the whole and every part of the instrument. There is no doubt in my mind about what was intended to be conveyed by Mr. Watts, nor is there any doubt in my mind as to what was actually conveyed by the deed of 1870. It is clear to my mind that it was intended to convey and did convey the Baca Float of 1863 as described in the conveyance from the Baca heirs to Watts on May 1st, 1864. I think that the language used indicates that the dominant idea in the mind of the grantor, Watts, when the deed was made was of Baca Float No. 3 of 1863, conveyed to Watts by the Baca heirs in 1864, and not of the particular lines or marks by which it might be described."

In so holding the Court violated no rule of law; but on the contrary followed the rules laid down in the cases where there is a conflict in the description of the property conveyed or two different descriptions, or where a part of the description is erroneous.

The description of the property conveyed is: "All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains." So far it is consistent with the Court's holding, for Mr. Contzen, who made the government survey in 1905 of the 1863 Location, testified (rec., pp. 382, 383) that a large part of the 1863 location was composed of the spurs and ridges of the Santa Rita Mountains, and that it was generally considered the foothills of the Santa Ritas.

The description continues: "* * * granted to the heirs of Luis Maria Cabeza de Baca by the United States." That certainly applies to the 1863 location.

The description goes on: "and by said heirs conveyed to the party of the first part," that is, John S. Watts, "by deed dated on the 1st day of May, A. D. 1864". That correctly describes the 1863 location.

Then follows the courses and distances of the 1866 location, and the description concludes: "The said tract of land

being known as Location No. 3 of the Baca Series." That describes the 1863 location.

So we have four out of the five elements of the description properly applicable to the 1863 location; and if they were the only elements which the deed contained, there would be no question that the 1863 location was described in and conveyed by the deed and that those elements form a complete description of the 1863 location.

The only element of the description which has not been followed are the courses and distances which are those of the 1866 location to which the grantor, Watts, never had title and which he had no power to convey, and which, except for a small overlapping portion in the northeast corner is an entirely different tract of land from "Location No. 3 of the Baca Series granted by the United States to the heirs of Luis Maria Cabeza de Baca and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May A. D. 1864," which according to the very language of the deed it was the intention of the parties should be conveyed.

Another very persuasive consideration that John S. Watts intended to and did convey the 1863 location to Christopher E. Hawley by the deed of 1870 is that Watts was a skilled and experienced land lawyer and, if he had intended to convey the land within the boundaries indicated by the courses and distances, it would have been a simple matter to confine the description to such courses and distances as would ordinarily be done.

The fact that Watts inserted these other elements indicates very strongly that he intended to and did convey, as the Court found, the 1863 location.

A still further argument in support of the finding of the Court below is that there was but one Baca Float No. 3. It was the third of the five square bodies of land which the sixth section of the Act of June 21, 1860, authorized the heirs of Luis Maria Baca who made claim to the same tract of land

as the town of Las Vegas to select and locate. There is no question of the description referring to two tracts "owned" by the grantor, so that it can not be determined which he meant to convey. There was but one of the five locations authorized by the act of June 21, 1860, known as "No. 3." There was but one tract of land conveyed by the heirs of Baca to Watts as "Location No. 3." The language itself of the deed to Christopher E. Hawley shows that the parties were thinking of those facts and not of the lines and boundaries of any particular tract of land. The deed purports to convey but one tract of land. The description, including the general and the particular descriptions, would include two tracts, one which Watts owned and could convey, and the other which he never owned and could not have conveyed. From the language of the deed, the facts and the circumstances attendant on its execution, it cannot be doubted that what was intended to be conveyed and what was conveyed was the land in question here, which is situated in the Santa Rita mountains, is the only tract complying with the description "granted to the heirs of Baca by the United States," or which such "heirs conveyed to Watts," or which was correctly described as "Location No. 3 of the Baca Series." Consequently the erroneous portion of the description, that is, the courses and distances, were properly rejected since what was left was sufficient to ascertain the application of the deed.

The rules that a particular description generally prevails over a general description, that monuments control courses and distances or metes and bounds, that courses and distances or metes and bounds control a general description, and similar rules, are all merely rules of construction intended to ascertain the true intention of the parties and if this is otherwise ascertained give way to that intention.

In *Green v. Horn*, 207 N. Y., 489, the Court says (p. 499):

> "The rule that monuments control courses and distances is merely a rule of construction to ascertain the

intention of the parties. If that intention is otherwise manifested it must not be ignored in blind adherence to such a rule (*Brookman v. Kurzman*, 94 N. Y., 272; *Higgenbotham v. Stoddard*, 72 N. Y., 94; *Townsend v. Hayt*, 51 N. Y., 656)."

See, also, *M'Nichol v. Flynn*, 153 N. Y. Supp., 308.

Where in a deed there is more than one description and they conflict, that which is false will be rejected and the deed held to convey that which is correctly described, provided that there remains a sufficient description after rejecting the false.

In *White v. Luning*, 93 U. S., 514, the Court, quoting Greenleaf, says (p. 524):

> "Where the description in a deed is true in part but not true in every particular so much of it as is false is rejected and the instrument will take effect if a sufficient description remains to ascertain its application. Applying this rule to the subject matter in this suit we do not think there is any difficulty in reaching the conclusion that the description is sufficiently certain to pass title to the land."

In *State Savings Bank v. Stewart*, 25 S. E., 543, there were two descriptions of the lands in the deed of March, 1890, either of which contained sufficient particulars to enable the parties to identify the lands described, but when each description is applied to its subject matter it is ascertained that they described not the same but different parcels of land. One description was by metes and bounds and the other by lot and block numbers. The court says (p. 544):

> "Where the deed contains two descriptions of the land equally explicit but repugnant to each other that description which the whole of the deed shows best expresses the intention of the parties must prevail. The court will look into the surrounding facts and will adopt that description if certain and definite which in the cir-

cumstances under which it was made will most effectually carry out the intention of the parties. It is one of the maxims of the law that a false description does not render the deed or other writing inoperative if after rejecting so much of the description as is false there remains sufficient description as to ascertain with legal certainty the subject matter to which the instrument applies."

In *Boardman v. Reed*, 6 Pet. 328, the Court (McLean) says (p. 345) :

> " The entire description in the patent must be and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call which by other calls in the patent clearly appear to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain it is admitted that the grant is void. This however was not the case with the patent under consideration. Its calls are specific and taking them altogether no doubt can exist as to the land appropriated by it. The call for the county may be explained either by showing that it is made through mistake or that under the circumstances which existed at the time of the survey it was not inconsistent with the other calls of the patent. This would not be going behind the patent to establish it for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies under some circumstances to the construction of all written instruments. The meaning of the parties must be ascertained by the tenor of the writing and not by looking at a part of it. * * * "

In *Massie v. Watts*, 6 Cr., 148, The Court (MARSHALL, C. J.) says (p. 165):

> " They (courts) have also decided that if the location of certain material calls sufficient to support it and

to describe the land other calls less material and incompatible with the essential calls may be disregarded."

In *Parker v. Kane*, 22 How., 1, the Court (CAMPBELL) says (p. 18):

> "The description of the property conveyed as lots number one and six of the fractional quarter is a complete identification of the land having reference to the official surveys of the United States according to which their sale was made. A more general and less definite description can not control this, but whatever is inconsistent with it will be rejected unless there is something in the deed or local situation of the property or of the possession enjoyed, to modify the application of this rule."

The general description in this case was "being that part of the northeast quarter lying east of the Milwaukee River."

In *Holmes v. Trout*, 7 Pet., 171, the Court says (p. 217):

> "It will be observed that in giving a construction to an entry the intention of the locator is to be chiefly regarded the same as the intention of the parties in giving construction to a contract. If a call be impracticable it is rejected as surplusage on the ground that it was made through mistake." * * *

In *Leonard v. Osburn*, 146 Pac., 530, the description read in part "the land lying in Twin Lake Park in Santa Cruz County described as lot 10 in block 2, subdivision No. 6 as the same is shown on the map of Twin Lake Park made by N. E. Beckwith, etc.," the map being in fact made by E. D. Perry. The Court says (p. 531):

> "A deed is not void for uncertainty because of errors or inconsistency in some particulars of description. Generally speaking a deed will be sustained if it is possible from the whole of the description to ascer-

tain and identify the land intended to be conveyed. It is not essential to the validity of the deed, says Devlin in his work on real estate, section 1012, that the description shall be by boundaries, courses or distances or by reference to monuments. If the description is general, the particular subject matter to which the description applies may be ascertained by parol evidence. Nor will the deed be void for uncertainty from the fact that the description is in part false or incorrect if there are sufficient particulars given to enable the premises intended to be conveyed to be identified. Devlin on Real Estate, 3d ed., section 1016."

In *Baxter v. Calhoun*, 22 F., 111, the description was " a certain tract of land situated in the Borough of Arnold in the County of Westmoreland and State of Pennsylvania devised to the said George H. Calhoun by his mother, Mrs. M. M. Calhoun, by her will recorded in Westmoreland County in Will Book No. 8, page 126 containing twenty-two acres, more or less ", and the Court says (p. 114) :

> " The general rule is that parol testimony is not permitted to show the subject matter of the grant, but when the description is sufficiently definite to fix its location parol evidence is admissible to supply a particular description. It is clearly established by the authorities * * * that that which was capable of being rendered certain has been rendered indubitably certain by the testimony."

In *Flagg v. Eames*, 40 Vermont, 16, 94 Am. Dec., 363, the court held that repugnant words must yield to the purpose of the grant where such purpose is clearly ascertained.

In *Summer v. Hill*, 47 So., 565, the court held (567) that the description of the property conveyed as " Hancock Place " would prevail over the particular desciption.

In *Brier Hill Collieries v. Gernt*, 175 S. W., 560, the deed described the lands and then added " it being the true intention, purpose and understanding of the parties to this deed that the bargainers * * * hereby convey and assure all their rights, title, claim and interest in and to the properties hereinabove set out as fully as the same is in them and not otherwise," and the court says (p. 561) :

> " All parts of the deed must be construed together without regard to its mere formal divisions * * * thus construed the language which we have italicized explains, qualifies and limits the previous words so as to confine and restrict them to such ' right, title, claim and interest ' only in the lands described as was at the time vested in the vendors."

In *Virginia Iron, Coal & Coke v. Combs*, 177 S. W., 238, the court says (p. 238) :—

> " It is the rule in this state that where the description of the land conveyed is couched in such general terms that it will cover two or more tracts of land the ambiguity is a latent one and parole evidence is admissible to show which of the tracts was meant."

In *Marshall v. Carter*, 85 S. E., 691, the court says (p. 692):—

> " It is well settled that the description of land in a deed is sufficient if it furnishes means by the application of *aliunde* proof of identifying the land."

See also

State v. Herold, 85 S. E., 733.
Riley v. Foster, 148 Pac., 246.

In *Cecil v. Gray*, 148 Pac., 935, 936, it is held that " all of Section 30 " or " the undivided half of Section 30 " conveys

the section or half section and is not confined to the particular courses, citing 13 Cyc., 635.

In *East Tenn. Coal Co. v. Taylor*, 173 S. W., 433, the deed was held to convey Grant No. 21,903 though by clerical error it was written 21,902.

In *Moore v. M. & St. P. S. R. Co.*, 152 N. W., 405, it was held that description by lot number prevails where the boundaries are improper.

In *Waterhouse v. Gallup*, 178 S. W., 773, it was held that a deed is not void for uncertainty unless on its face the description cannot by extrinsic evidence be made to apply to any definite land.

In *Burbridge v. Ark. Lumber Co.*, 178 S. W., 304, it was held that in construing a timber deed in case of ambiguity evidence *aliunde* is admissible.

In *Brown v. Foster Lumber Co.*, 178 S. W., 787, it is held that the property may be identified by extrinsic evidence.

Where the two descriptions contained in the deeds are inconsistent the grantee may rely on that most beneficial to him (*Winter v. White*, 70 N. D., 305 ; *Buckhannon v. Stuart*, 3 H. & J., 327 ; *Merriman v. Blalack*, 121 S. W., 552 ; *Quade v. Pillard*, 112 N. W., 646 ; *Sharp v. Thompson*, 100 Ill., 447 ; *Armstrong v. Nudd*, 49 Ky. [10 B. Mon.], 144 ; *Hall v. Gittings*, 2 H. & J., 112 ; *Colter v. Mann*, 18 Minn., 96) ; that description which accords with the intention of the parties will be adopted and the other rejected as false or mistaken (*Banks v. Hawkins*, 75 Atl., 617 ; *Thompson v. Hill*, 73 S. E., 640 ; *Mylius v. Raines-Andrews Lumber Co.*, 71 S. E., 404 ; *Bender v. Chew*, 129 La., 849) ; that which gives effect to the deed rather than that which defeats the deed will be adopted (*Hall v. Bartlett*, 112 P., 176) ; that applying to the land owned by the grantor rather than that applying to land which he does not own (*Piper v. True*, 36 Cal., 606) ; the deed will be construed as a whole and interpreted in the light of

circumstances (*Hubbard v. Whitehead*, 121 S. W., 69); and finally, the deed will be construed most strongly against the grantor (*Vance v. Fore*, 24 Cal., 345; *Marshall v. Niles*, 8 Conn., 369; *L. E. & W. R. Co. v. Whitham*, 155 Ill., 514; *Holmes v. Howard*, 2 H. & M. H., 57; *Carroll v. Norwood's Heirs*, 5 H. & J., 155; *Carrington v. Goddin*, 13 Gratt., 587).

See, also,

Wilt v. Cutler, 38 Mich., 189.
State v. Rogers, 36 Mich., 77.
Anderson v. Bayles, 7 Mich., 69.
Ives v. Kimball, 1 Mich., 313.

III.

The deed from John S. Watts to Christopher E. Hawley of January 8, 1870, purported to and did convey the thing itself, Baca Float No. 3, according to the 1863 location and the deed of May 30, 1871, inured to Hawley and his successors in title.

While the terms used are "remise, release and quit-claim" this is more than a simple or pure quit-claim deed. The granting portion is as follows:

> "has remised, released and quit-claimed, and by these presents do remise, release and quit-claim unto the said party of the second part and to his heirs and assigns forever, all that certain tract, piece or parcel of land situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing One hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the

party of the first part by a deed dated 1st day of May, A. D. 1864, bounded and described as follows: Beginning at a point three miles west by south from the buildings known as the Hacienda de Santa Rita; running thence North twelve miles, thirty-six chains and forty-four links; running thence East Twelve miles, thirty-six chains and forty-four links; thence South Twelve miles, thirty-six chains and forty-four links; thence West Twelve miles, thirty-six chains and forty-four links to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Float Series. * * * And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the above described premises. * * * To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part his heirs and assigns forever."

The first thing to be observed is that this is not a conveyance of the interest which John S. Watts might have in the property, but it expressly conveys the property itself, and the habendum clause is that Hawley, his heirs and assigns, shall forever hold the property—not the interest of Watts in the property; and, as if to emphasize this fact, there is added the usual description in a quit-claim deed,

> " And also the estate, right, title, interest, property, possession, claim and demand,"

of Watts.

Now, the first thing to be determined, is the effect of this deed. By effect is not meant as to what particular land it conveys, but the effect as a conveyance upon whatever land it does convey.

The effect of such a deed is to convey the thing itself, not whatever interest the grantor may have had in the thing.

This is an important distinction, and the cases express it by saying that if the grantor intended to convey, and the grantee expected to have conveyed to him the thing itself and not merely the interest of the grantor in the thing, then, after-acquired property passes to the grantee, either because the grantor must be held to make good his obligation to convey the thing itself to the grantee, or because he is estopped from claiming an interest in the thing contrary to his grant.

In *Van Rennselar v. Kearney*, 11 How., 297, 325, the Court held that a deed which purports to convey a fee simple title carries after acquired property, saying the "estoppel works upon the estate and binds the after acquired title as between parties and privies." This is followed in *Lindsay v. Freeman*, 83 Tex., 259, 265; 18 S. W., 727.

In *Mosier v. Carter*, 35 L. R. A. (n. s.) 1182, there is an elaborate note which reads in part as follows:

> "When a person competent to act has solemnly made a deed (conveying not merely his interest at the time but a fee simple estate) he should not be allowed to gainsay it to injury of those whom he has misled thereby (Lindsay v. Freeman, 83 Tex., 263; 18 S. W., 727).
>
> * * * * * *
>
> "It follows that the rule of nonestoppel is only applicable to a deed of bargain and sale by release or quit-claim in the strict and proper sense of that species of conveyance. And therefore if the deed bears on its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality or that the bargain had proceeded upon that view between the parties then although the deed may not contain any covenants of title in the technical sense of the term still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him in respect to the estate thus described as if a formal conveyance to that effect had been inserted; at

least so far as to estop them from ever afterwards denying that he was seized of that particular estate at the time of the conveyance." Citing a large number of cases.

In *Pond v. Minnesota Iron Co.*, 58 F., 448, an action of ejectment by claimants under a deed conveying specific land against claimants of other land afterwards patented to grantor in first deed, the Court said (p. 451):

> " The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties and then to give effect to such intention if practicable or not contrary to law (2 Devlin on Deeds, sec. 836). * * * The conclusion seems irresistible that the minds of the parties met; that Peck and the others received what they intended to buy and Roussain delivered what he intended to sell. They never negotiated for or purchased the N. W. ¼ of sec. 33, T. 62, R. 15."

In *W. Seattle L. & I. Co. v. Novelty Mfg. Co.*, 31 Wash., 435, 72 Pac., 69, the Court said (p. 443):

> " The deed in question purports to convey more than the release of the grantor's claim at the time. It conveys the 'land itself.' * * * Held to carry after acquired title.
>
> The petitioner's deed *purports* to be an unqualified grant of the land. It *purports* to pass the whole estate and it is *utterly inconsistent* with the plain import to allow the petitioner to show that only a part of the estate passed by that conveyance."
>
> Heard v. Hall, 16 Pick., 461.

Though a quit-claim deed may not operate as an estoppel when upon its face and by its terms it only purports to release and quit-claim whatever interest in the premises the grantor then has; yet *if in such deed* the grantor either by way of

recital or *otherwise represents himself* as being the owner of the premises such grantor and any one claiming under him by descent or devise or by any subsequent conveyance of the premises, *may be estopped from alleging or proving the contrary.*

Belletrean v. Jackson, 11 Wend., 117.
Jackson v. Waldron, 13 Wend., 187.
Chautauqua Co. Bk. v. Risley, 4 Denio, 486.
Fithughs Exors. v. Tyler, 8 B. Monroe, 561.

> " There are many cases to be found in the books from whence we may collect that the Courts have thought that a conveyance *without warranty* will *equally* operate as an estoppel; and that when the ancestor is estopped the heir shall also be estopped."
>
> *Lord Kenyon in Good Title v. Morse*, 3 T. R., 371.

Though a deed contained no covenant but that of non-claim, this was treated as a covenant real which runs with the land and it was decided that a title subsequently acquired by the grantor enured to the grantee.

Fairbanks v. Williamson, 7 Maine, 99.

> " Although a deed of bargain and sale, by way of *release* and *quitclaim* purports to convey nothing more than the interest which the grantor *has at the time* still if the deed bears on its face evidence that the grantors *intended* to convey and the grantee *expected* to become invested with an estate of a particular description or quality and that the bargain had proceeded upon that footing between the parties, although it may not contain *any* covenants of title in the technical sense of the term, still the legal operation and effect will be as binding on the grantor and those claiming under him as to this expected estate as if there were a formal covenant so as to estop them from ever afterwards denying that he was seized of *that particular expected estate* at the time of the conveyance."
>
> " And whatever may be the form or nature of the conveyance to pass real property if the seisin or pos-

session of the grantor of a particular estate is affirmed either in *express terms* or *by necessary implication*, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the *estate* and binds *all after acquired* title as between parties and privies."

Van Renneslaer v. Kearney, 17 How., 297, 325.
Herman's Law of Estoppel, p. 279, secs. 258, 259, 260, Ed. 1891 & *(n)* 3 citing many decisions.

When the warranty is not general but is limited to any title to be derived from or under the grantor it has the same effect to create an estoppel that it would have had if it had been with general warranty.

Kimball v. Blaisdetl, 5 N. H., 535.

A deed which estops a grantor equitably estops all persons in privity, all claiming under and through him, *whether heirs, devisees or subsequent purchasers.*

Stow v. Wyse, 7 Conn., 220.
Hill v. Hill, 4 Barbour, 430.
Douglass v. Scott, 5 Ohio, 198.
See, *Rawle on Covenants*, Ch. 9, pp. 404, 410, 2nd Ed.

What is not an "After-Acquired" Interest?

If a person has paid for a tract of land and is *entitled* to but has not gotten a good deed therefor, and in this condition of things conveys the land to a grantee by deed, with special warranty or of remise and release, and then after this the grantor receives a deed for the land, this is not in legal contemplation an "after-acquired" interest, and the grantor and those claiming under him are estopped from claiming and asserting such title against such grantee.

Irvine v. Irvine, 9 Wall., 625.
Herman on Estoppel, Sec. 263 & (*n*) 4.

And in the case under consideration it is abundantly clear, from the title bond of Watts to Wrightson, the deeds to Watts from the Bacas of May 1, 1864 and May 30, 1871, the deed from Watts to Hawley of January 8, 1870, and the contract between Watts and the Baca heirs—that Watts at the date of his deed to Hawley and long prior thereto had paid for this Float No. 3 and was entitled to a good and sufficient deed for the whole tract—and therefore by the deed to him of May 30, 1871, he did not get any "after-acquired" interest or anything which he or his heirs or any one claiming through or under him, could assert and claim against Hawley or those claiming under him.

It will be noted that Watts quitclaimed the land itself, and not his right, title and interest. He passed a title. By Sec. 33 of the *Howell Code of Arizona*, adopted in the Fall of 1864, it is provided :

> "If any person shall convey any real estate purporting to convey the same *in fee simple absolute* and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

This statute remained in force for many years and until after 1871. Watts having conveyed the land itself, even if by quitclaim, any subsequent title would go to his grantee.

There is a later statute in Arizona to the effect that a conveyance shall only pass what the grantor then had, and no more, but this statute was passed after 1877.

It would thus appear that Hawley, by his deed from Watts of 1870, acquired all of the interest Watts ever acquired.

Bogg v. Shoab, 13 Mo., 366, 373, and *Cecil v. Gray*, 148 Pac., 935, were decided under similar statute.

The Court below stated very clearly the principle upon which the foregoing point is based in that it said (rec., p. 418) :

> " I think it can not fairly be said that Watts having obtained the deed from the Baca heirs on May 1, 1864, which was executed by nearly all of the heirs in person and by certain of them by other persons purporting to act for certain of the heirs who did not sign, that Watts afterwards conceived the idea of having all of the heirs execute the deed of 1871 to him and thereby convey title to him for his, Watts', benefit, and not for the benefit of his grantee, Hawley. I do not think that there is anything in the testimony to indicate that such was the purpose and intent of Watts at the time he obtained the deed of 1871.
>
> " I am likewise of the opinion that if it be admitted that certain of the Baca heirs did not properly execute the original deed to Watts and thereby convey their respective interests therein and that the people who signed that ancient document were not authorized on behalf of those who did not sign to execute it, that their subsequent ratification of such signature and conveyance in the deed of 1871 to Watts, and that the title thereby acquired by Watts inured to the benefit of Watts' grantee, Hawley."

Summary.

Two further facts illustrate the correctness of the foregoing conclusion. The deed of May 30, 1871, primarily conveys other tracts of land and the fact that John S. Watts in concluding it incorporated a confirmation of the deed of 1864 to him and his *assigns* and a quitclaim of the land conveyed by that deed shows that he intended to secure for his " assigns " the full title.

The other fact that shows that John S. Watts regarded the deed to Hawley as conveying whatever he had acquired from

the heirs of Baca is that there is no evidence that he ever claimed any interest in the 1863 location after the conveyance to Hawley though he lived until 1876 and that it was only after his death in 1877 that any claim on behalf of his heirs was made and then it was an attempt to again relocate (rec., p. 179).

IV.

The several deeds subsequent to the deed from Watts to Hawley under which Watts and Davis claim contain substantially the same description as the deed to Hawley, and were intended to and did convey the 1863 location.

In the deed dated May 1, 1884 from Christopher E. Hawley by James Eldredge his attorney to John C. Robinson, the description of the property is identical with that in the Hawley deed and has the additional element that the property conveyed is described as being that " by said Watts conveyed to the said Christopher E. Hawley by deed dated on the 8th day of January 1870."

In the deed dated December 1, 1892 from John C. Robinson to John W. Cameron the property is identified as " the same being the southern half of the tract of land known as Baca Float No. 3."

In the several deeds dated September 22, 1893, from John C. Robinson, John W. Cameron and Mrs. A. T. Belknap, James Eldredge and Charles A. Eldredge to Alexander F. Mathews, and in the deed dated September 25, 1893 from John W. Cameron to Alexander F. Mathews the property is described as " the southern half of the tract of land known as Baca Float No. 3."

In the deed dated February 8, 1907, from the heirs and executors of Alexander F. Mathews to Watts and Davis the property is accurately described as Baca Float No. 3 granted to the Heirs of Luis Maria Baca by the United States and conveyed by them to Watts by the courses and distances of the 1863 location.

When these deeds are read in the light of the surrounding circumstances and the facts attending their execution, the Court below properly held them to convey the 1863 location under the authorities cited under the foregoing points in this brief.

In this connection the Court below very properly, and in thorough accord with the principles laid down in the cases cited, said (rec., p. 417):

> "To enable me to interpret the language used in the conveyances" (referring to the foregoing conveyances and the Hawley deed) "and especially in the conveyance from Watts to Hawley, I have considered the evidence and the circumstances under which the deed was executed and also the testimony introduced by the defendants showing the subsequent acts, conduct and declarations of the parties. The rule to be followed by a Court of Equity in construing a deed is that the real intent of the parties must be gathered from the whole transaction including the general as well as the particular description which should be construed so as to give effect to the whole and every part of the instrument."

V.

The various instruments and proceedings under which the several defendants below other than the Bouldins claim, constitute clouds upon the title of Watts and Davis.

A Cloud on Title.

The definition is defined to be :

> " A semblance of title, either legal or equitable which if valid would affect or encumber the title, but which cannot be shown except by extrinsic evidence to be invalid."
>
> *Glos v. People*, 259 Ill., 332, 342 ; 109 N. E., 763.
> *Allott v. Am. S. Co.*, 237 Ill., 55 ; 86 N. E., 685.
> *Parker v. Miller-Brent L. Co.*, 47 So., 580.

But see

Arthur v. Griffith, 61 S. E., 519.

The following cases support the proposition that to constitute a cloud it is necessary that extrinsic evidence must be required to show the invalidity or other ground why the title is not affected.

Graves v. Ashburn, 215 U. S., 331.
Johnson v. Cramer, 203 F., 733, 742.
Ogden Co. Armstrong, 168 U. S., 224. 238.
Rich v. Braxton, 158 U. S., 375.
Accord v. West Poc., Corp'n (C. C. 156 F., 989, 998, aff'd 174 F., 119).

In *Thompson v. Pinnell*, 237 Mo., 545, 141 S. W., 805, the Court said :

> " The owner of the legal title who is in possession or the owner of an equitable title whether in possession or not, may in either case sue in equity to remove a

cloud on its title to real estate when the deed, instrument, or record creating the cloud is not void on its face, but resort must be had to extrinsic oral testimony."

In *Dooley v. Proctor & Gamble*, 158 A. D., 429; 143 Sup., 650, it is held that unless necessary to prove invalidity by extrinsic evidence there is no cloud; and in *Hawes v. Clarke*, 159 A. D., 65, 144 Sup., 11, it is held that papers which the Register of Deeds is not entitled to record can not create a cloud.

Ordinarily the Plaintiff Must be in Possession.

This is held in the following cases:

Roberts v. N. P. Co., 158 U. S., 30.
Whitehead v. Shattuck, 138 U. S., 146, 154.
Golden Cycle N. Co. v. Christmas Gold M. Co., 204 F., 939, 123 C. C. A., 261 (C. C. A., 8th Cir. Col., 4/14/13).
Campbell v. Farmers Mfg. Co., 203 F., 571.
Graves v. Crawford, 149 F., 968.
Elliott v. Atlantic City, 149 F., 849.

But if, as in our case, there is a special ground of equity jurisdiction, that is, the construction of the Hawley deed, in addition to the ground of the removal of cloud or quieting of title, then possession is not necessary.

Fies v. Rosser, 50 So., 287.
Rowe v. Allison, 112 S. W., 395.

In *Butterfield v. Miller*, 105 F., 200, 202 (C. C. A. 8th Cir., 2/13/12), where the question involved was the construction of a deed, it was held that possession was not necessary; so in *Solis v. Williams*, 205 Mass., 350; 91 N. E., 148, where the cancellation and discharge for invalidity of a conveyance of record was sought; in *Snyder v. Wheeler*, 81 Kan., 508;

106 Pac., 462, where cancellation was sought on the ground of existing encumbrances; in *Lewis v. Alston*, 63 So., 1008, where cancellation of a deed on the ground of undue influence; in *King Lbr. Co. v. Sprague*, 58 So., 920, to remove a mortgage on the ground of failure of consideration; and in *Baxter v. Baxter*, 92 N. E., 881, 1039, where the deed was claimed to have been unlawfully and fraudulently obtained.

Possession is not necessary where the primary relief sought is upon another feature of equity jurisdiction.

Jefferson v. Gregory, 73 S. E., 452.
Otey v. Stuart, 91 Va., 714; 22 S. E., 513.
Austin v. Minor, 107 Va., 101; 57 S. E., 609.
Booth v. Wiley, 102 Ill., 84, 113, 114.
Swick v. Resse, 62 W. Va., 557; 59 S. E., 510, 511.
Shipman v. Furness, 69 Ala., 555; 44 Am. Rep., 528, 531.

Nor is possession required if the plaintiff's title is equitable.

(*Kimball v. Baker L. & T. Co.*, 152 Wis., 441, 450.
Shannon v. Long, 60 So., 273.
Mustard v. Big Creek Dev. Co., 72 S. E., 1021—in this case there was a title bond.)

Nor is possession required in cases where it is not to be expected, as in the case of uninclosed woodland (*Graves v. Ashburn*, 215 U. S., 331, 334; s. c., 149 F., 988), or unoccupied land (*Warren v. O. & W. R. R. Co.*, 156 F., 203).

Neither is possession necessary where the defendant sets up by answer or cross-bill, or otherwise, affirmative claims and asks affirmative relief.

Bradtl v. Sharkey, 113 Pac., 653, 654.
Siedschlag v. Griffon, 112 N. W., 18;

and where the plaintiff is "not in possession", the defendant having made his answer a counterclaim and sued to have

his title quieted, the question of title may be settled by the Court.

Sanders v. Riverwide, 55 C. C. A., 240.
Vance v. Gray, 142 Ky., 267 ; 134 S. W., 181.
Johnson v. Farris, 140 Ky., 435 ; 131 S. W., 183.
Hall v. Hall, 149 Ky., 817 ; 149 S. W., 112.
Clark's Heirs v. Boyd, 152 Ky., 134 ; 153 S. W., 227.

Where the defendant has answered the cross-bill and the bill, he cannot object to the Court making a full determination of all questions.

(Egan v. Mahoney, 24 Col. App., 285.)

Possession Through Tenant Sufficient.

Where possession is necessary it is sufficient if it be through tenants (*Upchurch v. Sutton Bros.*, 142 Ky., 420 ; 134 S. W., 477, 478 ; *Stewart v. May*, 111 Md., 162 ; 73 Atl., 460).

That the Possession is Taken for the Purpose of the Suit is not Material.

This is held in *Perry v. McDonold*, 72 S. E., 745 ; *Kraus v. Congdon*, 161 F., 18 ; *Apperson v. Allen*, 42 Mo. App., 537.

In *Stanley v. Topping*, 143 Pac., 632, it was held that the defendant in his suit to determine adverse claims, having denied plaintiff's title cannot claim that the plaintiff was guilty of fraud in securing possession.

Nature or Character of Possession.

The following cases construe the words " peaceable possession ", which is used in the Alabama Statute, and may be examined as to the nature of the possession which is sufficient in this case :

Vaughan v. Palmore, 57 So., 488, 490.
Central of Ga. Ry. Co. v. Rouse, 57 So., 706.
G. E. Wood L. Co. v. Williams, 47 So., 202.

Against Whom Action May Be Brought.

In *Berry v. Howard*, 146 N. W., 577, it is held that a statutory action to quiet title or remove cloud may be brought against all the world.

See :

Faxon v. All Persons.

In view of the foregoing authorities, it seems scarcely necessary to take up separately the several instruments and the proceedings under which the Santa Cruz Development Company, Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt severally claim, since a reference to the statement of facts will show that they were executed either by persons whose predecessors in title had already conveyed the property to the predecessors in title of Watts and Davis, or were proceedings against persons who had acquired the alleged interest in the property under the void deeds, or against persons who had divested themselves of whatever interest they had in the property prior to the commencement of the proceedings.

Especially is the attention of the Court called to the deed dated February 7, 1894, from Powhatan W. Bouldin and his wife and James E. Bouldin to Alexander F. Mathews, and from John Ireland and Wilbur H. King to the same, in which the property conveyed is described as the southern half or one-half of the tract of land known as Baca Float No. 3 in connection with the alleged judicial proceedings against David W. Bouldin in which the sale under which Joseph E. Wise claims was made July 31, 1895, of the interest of Bouldin, Administrator, as of date of sale, and also in view of the alleged conveyances, dated April 8, 1907, from Mrs. A. M. Ireland to Joseph E. Wise, and April 24, 1907, from Wilbur H. King to Joseph E. Wise.

It is submitted that the Court below properly found that these instruments and proceedings constituted a cloud upon the title of Watts and Davis, and that the decree quieting the title in Watts and Davis and removing the cloud was proper and should be affirmed.

POINT VI.

The right of Watts and Davis to maintain this action is not barred by laches or by any statute of limitations.

As has been previously pointed out, this is an action to quiet title and remove cloud, and in such an action the question of laches and the application of the statute of limitations is governed by the rules peculiarly applicable to this kind of action.

In *Reich v. Cochran*, 213 N. Y., 416, the Court, referring to the case of Miner v. Beekman, 50 N. Y., 507, said (p. 425) :

> " In that case Judge GROVER said, referring to a case where the mortgagor had continued in possession, that the right to maintain the action for the purpose of removing a cloud from title is a continuing right ' that may be asserted at any time during the existence of the cloud ; never barred by the statute of limitations while the cloud continues to exist ' (p. 343)."

In *Shannon v. Long*, 60 So., 273, 275, the Court pointed out the distinction which it is sought to make above, and held that the action was not to forfeit a lease, but that, upon the facts shown, to declare that the lease had been forfeited and that consequently a different question arose as to the application of the rule as to laches.

In *Shelton v. Horrel*, 134 S. W., 988, 999, laches is held to be conduct which induces another to act to his injury, and in *Coates v. Cooper*, 140 N. W., 120, 124 (Minn.), the Court says:

> " In the assertion of adverse claims, laches can be claimed only if the defendant has been injured."

In *Buckman v. Cox*, 59 S. E., 760 (S. C. App., W. Va., 11/26/07), the Court said (p. 762);

> " Laches in legal significance is not delay but delay that works a disadvantage to another. So long as the parties are in the same condition it matters little whether one asserts a right promptly or slowly within the limits allowed by law * * *." Citing 5 Pom., sec. 21, and cases.

In *Lougee v. Wilson*, 131 Pac., 780 (Col.), laches was held not to be applicable to the statutory action.

In *Bradley L. Co. v. Langford*, 160 S. W., 866 (Sup. Ct. Ark. 10/27/13) the lands were forfeited to the State for the non-payment of taxes, but the forfeiture was void. Thereafter, until 1911, the owners paid no taxes, and exercised no control over the land. In 1903 the State conveyed the land, and the subsequent grantee paid taxes for seven years, but had not the seven years possession necessary to adverse possession when suit was brought to cancel the conveyance from the State. *Held* that the former owners were not barred by laches.

In *Parks v. Roth*, 137 Pac., 76–78 (Col. 12/8/13) the plaintiff proves fee simple title to himself from the Government; and it was held in this case that laches were not applicable.

In *Thurston v. Tubbs*, 257 Ill., 465, 100 N. E., 947, 950, it was held that in suits to remove cloud, not to reform, cancel, etc., the limitation applicable to such suit was not analogous to that applied in the case of a subsequent will after the tes-

tator had already deeded the property, if held to be a suit to set aside such will.

In *Coates v. Cooper, supra,* it is held that an action to remove cloud is not such an action as the statute applied to. In *Scholle v. Finnell,* 137 Pac., 241, 243, the Court said:

> "The principal danger which plaintiff seeks to avert neither is nor can be older than the title which it threatens. In short, the plaintiff's right to bring this action does not antedate the facts in which it had its origin. The plaintiff became owner of the land on the 3d day of October, 1857, when he received the sheriff's deed and he then for the first time had a title to be clouded."
>
> *Foster v. Gray,* 133 Pac., 146.
> *Manson v. Marks,* 52 Cal., 553, 124 Pac., 187.
> *Empire R. & C. Co. v. Mason,* 126 Pac., 1129.

No title by prescription could be acquired until after the segregation of the land from the public domain.

1 Cyc., pp. 1113, 1114, and cases cited.

In this case, therefore, there is no question of laches or the action being barred by the Statute of Limitations.

POINT VII.

The question of adverse possession or title by prescription is not in the case.

Though in the pleadings the defendants Wises set up a claim of title by adverse possession or statutory prescription, when it came to the hearing, their counsel, in response to a question of the Court, stated that he made no claim of adverse possession or adverse possession under color of title, but only

of such possession as would give notice to everyone that the occupant had some kind of claim (rec., p. 390).

In his brief counsel for Joseph E. Wise has a brief point in which he tentatively suggests that Joseph E. Wise and Lucia J. Wise may have some rights by adverse possession, notwithstanding that the land was not segregated from the public domain until December, 1914. It is deemed a sufficient answer to call the court's attention to 1 Cyc., 1113, 1114, and the cases there cited which show that, under the circumstances of the Wises, the cases which hold that a person may hold adversely against all the rest of the world though holding in subordination to the United States. Those cases relate to a person in possession seeking to perfect his title from the United States, the title being afterwards perfected.

VIII.

Some Inaccuracies in Appellants' Briefs.

The appellants' briefs were not received until after this brief was in type and too late to answer them beyond merely pointing out certain objections which a casual reading discloses and which are of a general and pervading character in those briefs.

Brief of Mr. Franklin for Appellants.

Throughout he characterizes the deed from John S. Watts to Christopher E. Hawley, dated January 8, 1870, as a quitclaim deed when what it is is one of the questions in the case. The appellees Watts and Davis claim that it is not a mere quitclaim but purports to convey the land itself not the right, title and interest of Watts in the land.

In the early part of his statement of facts he states that three different tracts of land were selected by John S. Watts as attorney for the heirs of Luis Maria Baca as and for location 3, and the statement is so made as to be misleading when it is considered that much of the argument in the case turns on the question what the parties to conveyances meant when they referred to "Location No. 3 of the Baca series" or "Baca Float No. 3". Mr. Franklin would have been right had he said that Watts first sought to secure land on the Bos Redondo but on account of the exposed condition of that section was allowed to withdraw his claim, it never having been approved by the Commissioner of the General Land Office, and to select the 1863 location, that in question here, and that after the expiration of the time limited by Congress Watts sought, as he claimed to amend the 1863 location, but it was held finally that it was an attempt to relocate which was unauthorized. Consequently the true statement would be that though attempts to select three tracts were made only one was successful. The difficult confusion arises from the fact that the act of Congress authorizes the heirs of Baca to select in square bodies not to exceed five in number and that in question was the third of such five locations to be made and was designated as the "Location No. 3 of the Baca series" or "Baca Float No. 3" for that reason. But as Mr. Franklin states it a person might easily be led to believe the reference in a deed to "Location No. 3 of the Baca series" to be to what Mr. Franklin calls the "third tract" and which is the 1866 location as known in the case.

Mr. Franklin's statement that for thirty-three years from 1866 to 1899 there were two sets of claimants, one claiming the 1866 location and the other the 1863 location, is not true. It is true that Watts conveyed to Hawley and that those claiming under that conveyance acted on the assumption that Baca Float No. 3 was correctly described by the courses and distances of the 1866 location until the decision of the depart-

ment in 1899 and that in 1878 and 1884 Bouldin secured certain instruments in which the particular description was that of the 1863 location but as soon as Bouldin went to the land office he found the true situation and secured title through those claiming under the deed to Hawley.

Starting from the foregoing false premise Mr. Franklin draws the equally false conclusion that the Wises, Santa Cruz Development Company and the intervenors claim under claimants to the 1863 location and that Watts and Davis claim under the 1866 location when all deraign their title from the same source, John S. Watts.

When Mr. Franklin comes to consider the title of Watts and Davis instead of commencing at the beginning and tracing the title down in the usual way and considering the deeds together he begins with the seven deeds to Mathews. This is not the correct way to arrive at a correct interpretation of the deeds.

Mr. Franklin's statement that there is no reference in the deed from Hawley to Robinson to the deed executed by John S. Watts to Hawley being the source of Hawley's title is not understood as the description reads " and by said Watts conveyed to the said Christopher E. Hawley."

The foregoing are some of the misleading statements and conclusions which have been observed. The Prentice cases, upon which so much reliance is placed, are clearly distinguishable from the case at bar in that, among other things, it was impossible from the description there to identity the land.

Brief of Mr. Brevillier for Santa Cruz Development Co.

On page 8 of his brief Mr. Brevillier makes a point of the fact that Mathews in his petition to the Secretary of the Interior for a reversal of the decision holding the 1866 location void alleged that it was known as Baca Float No. 3.

That was true, but Mathews also knew, and no one ever claimed otherwise, that there was but one Baca Float No. 3. There might be a difference of opinion as to where it was, to what particular land it applied, since it had never been formally segregated from the public domain, but there was no doubt what it was, the third of the five selections authorized by the act of June 21, 1860.

On pages 35 and 36 Mr. Brevillier attacks the letter of March 27, 1864, from John S. Watts to William Wrightson. Upon reference to the record in the case in the Supreme Court it will be seen that that letter was certified from the files of the General Land Office and appears as a part of the proceedings in the case.

The foregoing is not offered as a complete answer to the briefs mentioned but merely to call attention to certain matters which were noted.

IX.

The decree of the Court below should be affirmed as to that portion which recognizes the title of Watts and Davis to eighteen-nineteenths of the south half of the 1863 location.

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HERBERT NOBLE,
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Of Counsel.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES E. BOULDIN, JENNIE N. BOULDIN, ET ALS.,
Appellants.

—vs.—

JOSEPH E. WISE AND MARGARET W. WISE,
Appellees.

No. 2719.

Additional Brief of Appellants

JOSEPH W. BAILEY,
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Additional Brief of Appellants

ADDITIONAL BRIEF OF THE BOULDIN APPELLANTS ON THE CLAIM OF JOSEPH E. WISE AND MARGARET W. WISE TO AN UNDIVIDED ONE-NINETEENTH INTEREST IN THE LAND IN CONTROVERSY THROUGH DEEDS FROM CERTAIN PERSONS CLAIMING TO BE HEIRS OF AN ALLEGED ANTONIO BACA.

ASSIGNMENTS OF ERROR.

The appellants Bouldin, who are appealing from the decree of the court below on this question, assigned as error,

1. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions as follows:

> "Q. Mr. Baca, you have already stated that Prudencio Baca, who was a son of Luis Maria Baca, died in 1882, have you not?
>
> "A. Yes, sir.
>
> "Q. Now, prior to that time, did Prudencio Baca make any statements to you in regard to the relationship of Antonio Baca to Luis Maria Baca, deceased?"

for the reason that it had already appeared in evidence that at the time of the alleged statements by Prudencio to Marcos Baca a controversy existed as to who were the children and descendants of Luis Maria Baca, among whom was the alleged Antonio, and that it did not appear that there was no controversy in this regard at this time, and on the further ground that the said Prudencio Baca was one of the grantors of the Bouldin appellants, under whom they were claiming, and that the alleged declarations sought to be established, were made by him after he had parted with his title, and in derogation and disparagement of the title which he had conveyed, and upon the further ground that it appeared that the defendants Joseph E. Wise and Lucia J. Wise were claiming under the deeds of 1864 and 1871, and that the Bouldin appellants were claiming under said deeds; that in said deeds

were recitals or covenants that the grantors therein, among whom was said Prudencio, were the owners in fee simple of said Baca Float No. 3, and had full right to sell the same, and that the grantors were the sole heirs of Luis Maria Baca, (the said alleged Antonio not being a grantor in said deeds), and that the said Joseph E. and Lucia J. Wise, claiming under said deeds, and under said Prudencio, were estopped as against said recitals and covenants, to deny as against said appellants Bouldin the truth thereof.

2. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions, as follows:

> "Q. Now, will you please state what Prudencio Baca said to you on the subject of the relationship of Antonio Baca to his father Luis Maria Baca, at the conversation at Pena Blanco, 1873?"

The same objections to this evidence were made to the testimony previously quoted. For the sake of brevity we will not repeat them here.

3. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, as follows:

> "Q. Please state what Prudencio Baca said to you in 1873 at Pena Blanco in regard to who Antonio Baca was, and in regard to his relationship, if any, with Prudencio Baca himself, or Luis Maria Baca? A. I was inquiring from him who the children of Luis Maria Baca were.

Q. Go on and state what he said.

A. He gave me the names, amongst them the name of Antonio, as the eldest child of Luis Maria.

Q. The eldest child?

A. Yes, sir.

Q. Antonio Baca?

A. Yes, sir."

4. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to the following questions:

"Q. Now, you will please state the substance of that conversation, so far as it related to Antonio Baca."

5. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions as follows:

"Q. Did you know a Manuel Baca who was a son

of Luis Maria Baca?

A. Yes, sir.

Q. You have stated already you had a conversation with him in regard to Antonio?

A. Yes, sir.

Q. Now, please state the conversation that took place with Manuel Baca at that time in regard to Antonio Baca."

6. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions as follows:

"Q. You said you were acquainted with Domingo Baca, a son of Luis Maria Baca?

A. Yes, sir.

Q. Please state what he said on the subject of Antonio Baca, the relationship of Antonio Baca to Don Luis Maria Baca."

7. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, in response to questions, as follows:

"Q. Now, in the conversation you had with Prudencio Baca was anything said in regard to whether or not Antonio Baca had any children?

A. Yes, sir.

Q. I am speaking now of the conversation of 1875. What did he say on that point?"

All of these questions were objected to on the grounds set out at the head of this section. It all involves the same questions, and consequently we will not repeat the objections here at length. Suffice it to say that

these appellants objected to all the testimony sought to be elicited above on three grounds. First,—That they were not statements made ante litam motam. Second,—That they were statements made by grantors after they had parted with their title, and in disparagement of the title of their grantees. Third,—That Joseph E. Wise claims title to the land in controversy under the same deeds through which these appellants deraign their title, and therefore cannot be permitted while claiming title under those deeds to deny the truth of the recitals therein as against these appellants.

A general objection was also made to the admission of all the testimony of Marcos C. de Baca, and to the admission of the deeds from the heirs of the alleged Antonio Baca for this last reason.

A STATEMENT OF THE CASE.

We have made a statement of the case as far as it affects us in our main brief, and for the sake of brevity will not repeat that statement here.

POINTS.

I.

The statements of Prudencio, Manuel and Domingo Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were statements made by the grantors in a deed after they had parted with their title and in disparagement of the title of their grantees.

II.

The statements of Prudencio, Manuel and Domingo Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were not made ante litam motam.

III.

The defendant, Joseph E. Wise, claims title under the Hawley deed and the confirmatory deed, and therefore is bound by all the recitals in those deeds.

IV.

The testimony of Marcos C. de Baca is contradictory, improbable and not worthy of belief.

V.

The title involved in this suit is derived under the act of congress of June 21st, 1860, and in the grant made by the sixth section of that act neither Antonio nor his heirs could have had any interest.

ARGUMENT.

I.

The statements of Prudencio, Manuel and Domingo Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were statements made by the grantors in a deed after they had parted with their title and in disparagement of the title of their grantees.

The rule is thus stated in Cyc.:

> "Declarations of a grantor made after his grant in disparagement of his title are not admissible against his grantee or other person claiming through or under him to impeach the deed."
> 16 Cyc. 987.

The testimony of Marcos Baca was offered, of course, for the purpose of proving declarations of Prudencio, Manuel and Domingo Baca as to the existence of the brother named Antonio, and therefore to show that the deed which the declarants signed did not carry the full title.

Prudencio, Manuel and Domingo Baca all signed the deed to Watts, and each of them covenanted that those signing the deed had the full title. The declarations testified to by Marcos Baca are all in disparagement of the title which they had theretofore undertaken to convey to Watts. To admit evidence of such declarations is directly to permit them to overthrow in part the title which they had theretofore claimed and undertaken to convey.

While the declarations testified to by Marcos Baca might, if made by one who had not theretofore attempted to convey the title, have been admissible for the purpose of providing pedigree, to admit them for that purpose is to violate another elemental principle of evidence, and one of greater importance to the stability of titles.

The author of the article in Cyc to which we have invited attention, cites in support of the rule stated by him adjudicated cases from most of the states of the Union. Further cases are collected in annotations to Cyc. The text writers all agree that such declarations are wholly inadmissible. Jones on Evidence, section 245. 1 Greenleaf, 189; 2 Wigmore, Sec. 1085. The cases are so numerous that it is impossible to cite or quote all of them. We invite attention to the following:

> "The disclaimer and admissions of a grantor made after he has parted with his title to and possession of property are not admissible to impeach the title

of his grantee, immediate or remote.

Kurtz vs. St. Paul D. R. Company (Minn.) 63 N. W. 1.

"Such declarations are not admissible to defeat the grantee's title when made after the grantor has parted with the title and possession of the property. If such admissions be competent to defeat a deed duly delivered, no security could be given to deeds, as they would overthrow such deeds when offered, as in the case when the person making them had no interest in upholding his former title."

Leonard vs. Fleming, (N. D.) 102 N. W. 308.

"The admissions or declarations of the grantor with reference to this title made subsequent to his parting with title can never be admissible against his grantee. This is a fundamental principle of evidence that is too well established to require discussion."

Josslyn vs. Daly, (Idaho) 96 Pac. (Reading page 570, where numerous authorities are cited.)

"It has long been the settled law that the declarations of a grantor made after the transfer of both title and possession cannot be received in evidence as against the grantee."

Lent vs. Shear, (N. Y.) 55 N. E. 2. (This case col-

lects and cites the New York cases on the subject.)

The Texas cases holding the same doctrine are collected in West vs. Houston Oil Company, 136 Fed. (C. C. A.) 343.

In Burk vs. Hand, (N. J.), 16 Atl. 693, it was sought to show the acts and declarations of the grantor who made a deed in 1768 and who afterwards, in 1786, deeded to other persons.

The court says:

> "Nor are the declarations and acts of Silas Swain (the grantor) after the delivery of this deed competent evidence to overthrow it."

In Prittchard vs. Fowler, 55 Southern, 147, the question involved was whether one Fowler was sane when he made a certain deed to George and Cornelius Fowler. Evidence was offered of declarations made by Cornelius as to the mental condition of his grantor. The Supreme Court of Alabama, in passing upon the admissibility of this evidence, said:

> "While the declarations of George Fowler and of Cornelius Fowler in disparagement of their title might be admissible against them, or those holding under them, yet what Cornelius may have said as to how George acquired possession of the land could not be admissible if made after Cornelius conveyed his interest in the land to George."

In refraining from citing and quoting from other decided cases we do so only because they are so numerous that to undertake the task would be unduly to extend this brief. Furthermore, there is no conflict of authority.

The declarations of Prudencio, Manuel and Domingo Baca, as testified to by Marcos Baca, were made aftey they had parted with title, and directly disparaged, and in part destroyed, the title they had made. We are the grantees of Prudencio, Manuel, and Domingo, and as against us, the evidence is unquestionably not competent.

We would call the court's attetnion to the fact that such evidence is incompetent, that it is an infirmity in the evidence itself, and that nothing can be proved by it. As said by Jones, Sec. 241:

> "But the declarations of the grantor are not to be treated as admissions, and are not competent, if made before his interest in the property in question was acquired, or after he has conveyed it away, since the acts and declarations of the grantor after he has divested himself of his estate cannot be admitted to impeach the title of the grantee."

The objection therefore is not to the character of the witness or the weight or worth of the testimony, but such evidence is incompetent, and cannot be used.

Nor would an avowal that the evidence was not offered to disparage and defeat the title, but was only of-

fered to prove pedigree, be of any worth, if in fact the evidence did disparage the title of the grantee, and the effect of the evidence was to defeat the title. In other words, the evidence could not be admitted under the guise of proving something else, if in truth and in fact, it did defeat the title of the grantees, for evidence of this kind is not competent.

We have two rules: (1) Hearsay is competent to prove pedigree. (2) Hearsay declarations of a grantor are not admissible to disparage the title of a grantee. Having two rules they must be harmonized, and harmonized they are. Hearsay is admissible to prove pedigree, but declarations of a grantor, whenever they disparage the title of his grantee, are inadmissible as against the grantee, and if hearsay of pedigree disparages the title of the grantee, it cannot be received.

In this case the very hearsay declaration as to pedigree are the ones that disparage the title. As they do disparage the title, and in part destroy it, we then have a title impaired, in part, destroyed by declarations of the grantors, after they had disposed of their titles.

The way was open to the defendants Wise to prove pedigree by hearsay, but in so doing they could not use Prudencio, Manuel and Domingo, persons whose declarations would destroy or impair the title they themselves had conveyed. In other words the rule (that a grantor shall not be permitted, after he has conveyed and been paid the price, based on his covenants, to make declaration against his grantee that will destroy

what he has sold) is higher and of more controlling character than the proof of pedigree. If the defendants Wise desired to prove pedigree, it was incumbent upon them to do so by declaration of person whose mouths were not closed by their own acts against their grantees.

II.

The statements of Prudencio, Domingo and Manuel Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were not made ante litam motam.

The rule is that hearsay declarations as to pedigree are only admissible in evidence when made ante litam motam. Under this rule it is not necessary that suit actually be begun. All that is necessary is that the controversy which ended in the suit shall have commenced. If the declarations sought to be shown by hearsay testimony were made after the controversy which resulted in the suit was begun, then they are inadmissible because not made ante litam motam.

Wigmore thus states the rule in Paragraph 1483.

> "On the other hand, it is not necessary that litigation should actually have begun at the time of the declaration. The element to be avoided is a bias in the mind of a declarant; and this is sufficiently probable if a dispute or controversy is actually in progress, even though it may not have reached the stage of legal proceedings."

See also: Rollins v. Wicker, 70 S.E. 934- In re Waldens Estate 137 Pac. 35.

Marcos C. de Baca testified (Rec., page 346) that a suit was brought early in 1875 against the heirs of Luis Maria Baca for the partition of Baca Location No. 1, and the Ojo del Espiritu Santu grant.

He further testified that in that case the point in controversy was, who the heirs of Luis Maria Baca were (Record, page 352).

He further testified that he heard discussions ot claims about the Baca Location No. 1 prior to 1873, and that he heard discussions and claims about the Ojo del Espiritu Santu grant in 1873.

The witness was a lawyer and in his presence counsel for the parties who sign this brief had raised the objection that these statements were not made ante litam motam. All through, his tesimony on this point is shifty and evasive. The court will see at once on reading the testimony that he evaded direct answers to questions; but he was pinned down to the statement that he heard claims and discussions as to who owned Baca Location No. 1 and the Ojo del Espiritu Santu grant. His first conversation, he testified, with any of these heirs of Luis Maria Baca was with Prudencio Baca in 1873. According to his own testimony, at the time he had this conversation with Prudencio Baca there were claims and discussions about the Baca Location No. 1, which claims and discussions resulted in a lawsuit brought early in 1875 to determine who the heirs of Luis Maria Baca were. The statements which he says Prudencio made

to him are plainly inadmissible because not made ante litam motam.

His next conversation was with Manuel Baca, the son of Luis Maria Baca. He testified (Record, page 358) that he did not recollect whether he had any conversation with this Manuel Baca prior to 1875. He then testified that he did have a conversation with Manuel Baca in 1875. He had already testified that this partition suit was brought early in 1875, and when asked how long before the bringing of the partition suit his conversation with Manuel Baca occurred, he testified that it may have been six months, and it may have been a year. 1875 must have been an extraordinary year.

The inadmissibility of this conversation with Manuel Baca is too patent to require discussion.

His next conversation was with Domingo Baca in 1893 or 1894 (Record, page 359). He had this conversation nearly twenty years after the bringing of the partition suit in 1875, and it was therefore, of course, inadmissible.

For the reasons given above we submit that the trial court erred in not excluding the hearsay declarations of Prudencio, Manuel and Domingo Baca, on the ground that they were not made ante litam motam.

III.

The defendant, Joseph E. Wise, claims title under the Hawley Deed and the Confirmatory Deed, and therefore is bound by all the recitals in those deeds.

The defendant, Joseph E. Wise, claims title to two-thirds of the land in controversy in this case under the 1864 and 1871 deeds from the heirs of Luis Maria Baca to John S. Watts. In the 1864 deed the grantors covenanted that they were seized in fee of Baca Float No. 3, and the signers of the 1871 deed covenanted that they were all the heirs of Luis Maria Baca. Since the defendant, Joseph E. Wise claims title under those deeds, he is bound by the recitals therein. He cannot blow hot and blow cold at one and the same time. He cannot claim title under those deeds and yet deny the truth of certain parts of them. When he claims any benefit under those deeds from the heirs of Baca to Watts he must take the whole of those deeds.

In Gibson vs. Lyon, 115 U. S. 447, the court says:

> "He, (the grantor) certainly cannot be permitted to claim both under and against the same deed; to insist upon its efficacy to confer a benefit and repudiate a burden with which it has qualified it; to affirm a part and reject a part."

To the same effect are the cases of Fish vs. Flores, 43 Tex. 345.

> "To this it is sufficient to say, as appellees cannot be permitted to affirm and deny the recital in the deed at the same time and having relied upon it in support of their deed from Ocon, they are bound by it."

And Minor vs. Powers, 26 S. W. 1071-1072, 87 Tex. 83.

"Both parties claim under a deed from persons claiming to be the only heirs of Walsh, and in that deed they were so recited to be. Defendants cannot claim under this deed as from the only heirs of Walsh and deny the truth of the recitals as to the plaintiff."

IV.

The Testimony of Marcos C. de Baca Is Contradictory, Improbable and Not Worthy of Belief.

The testimony upon which the lower court allowed the claim of Joseph E. and Margaret W. Wise to an undivided one-nineteenth interest inthe land in controversy was that of one Marcos C. De Baca as to purely hearsay statements made to him forty years ago, when he was a boy of sixteen, as to the existence of and descent from an alleged Antonio Baca, who died, according to the witness' own testimony, about ninety years ago.

If there ever was such a person as Antonio Baca, and if he did leave heirs, then for more than fifty years, under the decree of the lower court, they have had an interest in this land. And not only in this land, for there are five of these Floats, each embracing one hundred thousand acres. But never in all this time have they been heard of. They have made no claim to their rights in this vast domain, and the only evidence we have of their existence is what Marcos C. de Baca says that Prudencio Baca, Domingo Baca and Manuel Baca told him forty years ago, when he was sixteen years old.

The very people who he says told him this had signed a deed two years before, in which they solemnly covenanted the exact opposite of what he says they told him. Can such a story be believed? Is it within the bounds of human probability? Most emphatically, NO.

Marcos Baca's story is a most remarkable one. It is remarkable that a boy of sixteen should be so impressed as to remember; remarkable that the persons whom he says told him had solemnly covenanted in writing only two years before, just the opposite; remarkable that **all** of the members of the family should so covenant as they did in the 1871 deed; remarkable that, if there was an Antonio, and his children should have been entitled to inherit, that they should have made no claim for fifty years; remarkable that the man who engineered the matter for Wise, is the same witness now trying to uphold what he has done; remarkable that Watts, a lawyer, when he filed applications with the government, did not mention Antonio; remarkable that Watts, when he took his deeds, knew nothing of Antonio, but did know all the rest of the family, he having lived in New Mexico for many years, and at the house of Tomas Baca, the father of the witness Baca.

Had there been but one application for a grant, Antonio's name might have been omitted by mistake; but here are two, and his name does not appear. Had there been but one deed, that of 1864, his name might have been omitted by mistake, but here are two, viz 1864 and 1871, and his name does not appear. Moreover his name

does not appear **anywhere** in either petitions for grants, or deeds. It is hardly possible that in signing deeds twice, his own brothers and sisters, then living, should have overlooked him, or his heirs.

Marcos Baca provided not a scrap of writing about Antonio. He says that some men now dead, told him there was an Antonio. In making this statement he is entirely safe, for there is no way of disputing his story of what these men now dead told him.

For more than fifty years, Antonio is unheard of. When all the others sold and got their money, in 1864 and 1871, neither Antonio nor his heirs appear. Strange, if there were such heirs, and all the rest of the family were selling out and getting money, they did not appear or make claim. There have apparently been no deeds from Antonio or his heirs, either among themselves or with strangers, for fifty years. If there had been such, it is fair to say they would have been produced. After this lapse of time, and all these circumstances, we find Mr. Wise going to New Mexico in 1913, and meeting this Mexcan lawyer, and then Antonio is habilitated. After the owners of the land, Watts and Davis and the Bouldins, had had title for more than forty years, after they had fought their battle through the Land Office and the Courts, all of a sudden, when they have something, Antonio bobs up.

Never was a claim to title so shadowy as this, so far fetched, and without foundation. Every brother and sister of Antonio, alive in 1864 and 1871, say that there

was no such person. They say this when in the 1864 deed they say they are the heirs, and when in the 1871 deed they covenant that they are all. And so every living child and descendant of the Baca family say the same thing when they signed these same deeds. Surely, if there was an Antonio and he left children, some sister, or some brother would have thought of him, or some nephew or some niece, out of the multitude of them. But he is not mentioned. In the claims before the government, not in one case, but in two, there is no mention. There is never a letter that he wrote, nor a will that he made, a deed to him or from him; not even a christening or church record, when he was born, or when he died—absolutely nothing.

Now, nearly ninety years after his death, along comes this witness and says that his great-uncle, Prudencio and his relatives Domingo and Manuel, told him there was such a person, and that his son was Juan Manuel, etc. These men are long since dead, but they are the same men who, when living in 1864, said just the contrary in writing. Surely also these men must have told Marcos Baca, at about the time or soon after, of so important a family transaction as the deeds of 1864 and 1871. These papers were recorded in New Mexico. Is it not strange that Marcos Baca for forty years, and he a lawyer, too, should have done nothing about these outstanding titles? So deep a delver into family affairs as he, beginning at sixteen when most youths have their eyes on the future, and not on the past, must have known about these deeds, have known

Antonio did not sign them, and that his alleged heirs had a title to one nineteenth of the grant, or 6,000 acres of land; and yet, nothing whatever was done until Wise, after forty years, appears on the scene with ready money. If written recorded titles may be upset by such testimony as this, no man is safe. He may hold for fifty years under a recorded written instrument, an instrument in which those who know best of family affairs, solemnly covenant that they are all the heirs and children, and then lose his holdings, and the great sums of money he has spent relying on his title, by the statement of one, that, forty years ago, when he was a boy, certain things were told him by the men who had made the title, and which statements were just the opposite of what they had covenanted.

What is to prevent Marcos Baca from saying that there is still another son? There is no evidence of such, but then neither is there any evidence of Antonio. What is to prevent Marcos Baca from saying that, forty years ago, when he was fourteen or sixteen, he was told that there was a son named Michael, and that he left a son, and so on down the line? And how could such an assertion be met? Are land titles to be disturbed by such flimsy statements? Who would believe him?

Opposed to the statement of Marcos Baca that he was told thus and so, forty or more years ago, we have the statement in writing of all of the then surviving brothers and sisters of the alleged Antonio, that no such person existed, or left heirs. Diego Baca, Luis Baca, Do-

mingo Baca, Jesus Baca, Josefa Baca, Marie Altagracia Baca, and Prudencio Baca, were, in 1864, all of the surviving children of Luis Maria Cabeza de Baca. hey signed the 1864 deed. In addition, there was Tomas, the father of the witness Marcos. These persons say in the 1864 deed, that they "are seized in fee of the lands aforesaid, and have good right and title to the same." The covenant is made for all who signed, namely, the eighteen children and their heirs. This is in effect a declaration that no other person or persons owned the land or any interest in it. This statement they could not, and would not have made, if there had been another son, or his heirs. As above stated in 1871, in the deed of that year, it is covenanted that they are the sole heirs of Luis Maria Cabeza de Baca. Also opposed are the petitions of John S. Watts to the government, and the testimony taken at that time, and published by the government fifty years ago; and on file in the Surveyor General's office in New Mexico, for a still longer time. This written evidence of the brothers and sisters themselves, of all the heirs, of the attorney for the heirs, of disinterested witnesses who testified in an official proceeding at the time, all of which has either been recorded or published for more than fifty years, is not to be upset, and a title destroyed by one who in 1915, declares by word of mouth, and without the scratch of a pen to support him, that forty years since he was told this or that. He contradicts his own father, he contradicts Prudencio, and for what? It was he, who, in 1913, got the deeds in question.

In testimony of such inherent weakness as that of Marcos Baca, the slightest breath of interest, the slightest suspicion, should destroy it. Even if there was no interest and no suspicion, even if the evidence should be as strong as it is possible for such innately weak and attenuated evidence to be, still, in that case, the statements of Marcos Baca fall far short of meeting the written evidence above pointed out, which has been matter of public record and knowledge for fifty years, and never before assailed.

Jones in his work on Evidence, Vol. 2, Sec. 317, speaking of the weight of such testimony as that of Marcos Baca, says: "Moreover it is evident that prejudicial and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and that they can do so with comparative impunity from exposure or punishment. Evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency."

And so in a leading English case, found in Book 52 of English Reprint 382, Sir John Romilly says that slight reliance is to be paid to the declarations of deceased persons, **said** to have been made before, but remembered after, the cause of litigation has arisen. Such evidence, he says, is usually given with great particularity, but is subject to no sanction.

Marcos Baca says (Rec. p. 375) that John S. Watts

made his home with Tomas Baca at Pena Blanca. There then, Watts must have met Tomas, Prudencio, and others of the family. He must have met this witness. Watts, of course, must have talked with the other surviving children of Don Luis, before, and at the time the deeds were executed. It is past comprehension that he would have overlooked Antonio, just as it is past comprehension to believe that the brothers and sisters would have made the covenant they did make, if there had been an Antonio, or if he had left heirs.

It will be observed that the conveyances were not merely of Location No. 3, but that they were of other locations as well, involving vast tracts of land. In none of them is Antonio named.

Another matter: According to this witness, he has known of Antonio and his children since 1873. In 1891, or thereabouts, the witness was admitted to the bar, and must have had some knowledge of titles. He knew of the lawsuit in 1875. He knew, he says, the different descendants of Antonio. Yet, from 1873 to 1913, a period of forty years, he took no action to get his relatives their title. During all of this time he took no action, and yet he must have known of the five different Baca Locations, and that this title of Antonio was outstanding. No suit, no claim, no demand on anyone, nothing. That is, nothing until Wise appears on the scene and pays him for his services.

Is it not strange, too, with what particularity the witness remembers that it was in 1873, that Prudencio told

him? It was not in 1875, for then a lawsuit was pending. It was in 1873, before the lawsuits. What was there about the fact that a great uncle of the witness, named Antonio, had lived, to impress a boy's mind? There were eighteen of these grand uncles and grand aunts. What was there about such a statement to sink so deeply into a boy's mind, that forty years later he can say it was in a certain year? Go back in your mind forty years, when you were a boy, and try to think whether if someone had told you about a distant relative, a relative far removed, you would be able to say, if you could remember it at all, that it was told you in a certain year? Such things are unlikely and improbable. But it will be noted of this witness Baca, that he testifies to things that happened before he was born; he says he knows them. In his statements he does not differentiate between what he knows, and what he has been told. At the same time it is very clear that he has given considerable time and attention to what he was going to say on the witness stand in this case.

And not only must the bare word of Marcos as to what these men said be taken to prove the existence of Antonio, but it must be taken for all else; that Antonio was married, that he left children, that these children left children, and who they were and what they inherited, and that they signed the Wise deeds. It is incredible that there are no writings to bear Marcos out, no letters, wills, deeds, probate records, church records of births and deaths during all this long period of time.

Clearly, Marcos Baca's testimony is inadmissible as to

recent events. The heirs could have been produced or their mothers or fathers, or records of births, etc. This is not the best evidence of recent events.

The foregoing remarks as to the untrustworthiness of Baca's testimony are proven by the testimony itself. The evidence is so contradictory, so full of opposite statements, that it destroys itself.

At the begining of his testimony (Rec., p. 330). Marcos Baca says that the reason he started to make a family tree was because he wanted to keep a record of the family, "and afterwards it was for the object of finding out the heirs of Luis Maria Cabeza de Baca in some partition suits that were brought against the heirs for some land that he owned in New Mexico." The witness next states that in the partition suit for Baca Location No. 1, a family tree was filed, and that he thinks he has a copy of that tree, and produces it. He is then asked if the list is a correct one of the sons and daughters and descendants of Luis Maria, and he states that it is a correct copy of the list that was presented in court in that partition suit of Location No. 1, and then he is asked if it is correct, from his investigations, and he says it is.

It appears (Rec., p. 347) that the partition suit on Location No. 1 was brought in 1875.

From the witness' statement, therefore, he began at the age of sixteen to study the family tree from mere desire, and that, at the mature age of eighteen, he began to study it for the purpose of a lawsuit.

He says (Rec., p. 330) that in the lawsuit of 1875, a family tree of the family was filed. He does not pretend to have made the tree. He had a copy of the tree filed in 1875, in the suit, produces it and says it is correct; he says it is correct from his investigations, and is a true copy of the tree filed in 1875. The list has not been changed, according to the witness, from 1875 up to date. It was correct when made. The witness offered but one list or tree during his testimony.

On page 373 of the record, the witness says that he made his original list in 1884, perhaps a little later. He made the list himself, he says, from what other people told him. He was asked if it was not copied from a geneological tree made by a lawyer, and he says it is not a copy. He is asked if he ever saw a list prior to 1884, and he says no. He is asked (Rec. 373) if he does not know now, that lists were made of the heirs in 1875, and he says he does not know, and that he has never seen the record in that case. Yet the list he offers, he says, is a true copy of the list made in the partition suit in 1875, and he says he began looking up the heirs for this partition suit in 1875. How did he know that his list was a true copy if he did not see the lists filed in the suit?

He also says that he showed to Prudencio in 1875 (Rec., p. 374), the original list of which the one produced in court is a copy.

On cross examination (Rec., p. 373) he was asked when he made the original of the list of which he produced a copy. He answered it was in 1884 or a little

later. He says he wrote down the data himself, presumably up to 1884. And at the same time he says it is a copy of a court paper made in 1875, and that it is a correct copy.

And so we have the statements:

The list is a correct copy of the one filed in the 1875 lawsuit.

He never knew that any lists of heirs were filed in the 1875 lawsuit.

He showed the original of the list he now produces to Prudencio in 1875, and Prudencio said it was correct.

The original paper, of which he now produces a copy, was made by him from scraps and conversations about 1884. This is a copy of the list.

The witness was asked if there was not a controversy over Location No. 1, and another grant (Rec., p. 348). He says there was none prior to 1875 (Rec., p. 349). It will be remembered that this is the same partition suit that the witness elsewhere states interested him in looking up the heirs, the same suit where the list of heirs was filed. He says there was no discussion, no controversy, prior to 1875. On page 350 of the record, he says that prior to 1873 he heard some claim about Float No. 1. He heard discussions.

He was asked (Rec., p. 352), if the issue in the case was not, who were the heirs of Baca? He says "yes."

"And they had a fight about who they were?" "Yes, sir." That was the question in controversy, wasn't it, as to whom the heirs * * * were?" "Yes, sir."

If the issue was, who were the heirs, and there were "discussions" in 1873, it is pretty hard to believe the discussions were not about the heirs, and who they were. It takes no very keen observer to be convinced that all of Marcos' inquiries, if he really made any, grew out of this lawsuit.

Again, the witness states (Rec., p. 355), that he had a conversation the second time with Prudencio. He says this was before the partition suit. "It may have been nearly a year." In another place he says the partition suit was brought early in 1875 (Rec., p. 347). His conversation with Prudencio must have been then in 1874. At this time he submitted to Prudencio the list of heirs, being the same list, or a copy of the one, produced in court. Marcos was then seventeen years old. The list is a complete list. Now, on page 330 of the record, he was asked if in the partition suit in 1875, a list was filed. He says, yes, and produces a copy of it, and swears it is correct, and that it is correct because of his investigations made since. It is the same list. It is hardly conceivable that the list filed in a lawsuit, undoubtedly on testimony taken in the course of the hearing, said lawsuit not having been brought until 1875, and thereafter the testimony taken should be the same list presented by Marcos to Prudencio in 1874.

Further, the witness says, as before pointed out, that

the partition suit was begun early in 1875. On page 355 of the record he says he showed the list which he produced in court to Prudencio nearly a year before the suit was brought, which would make it 1874. It appears that Marcos first spoke to Prudencio about the heirs in 1873. Here, then, is a complete family tree, reaching back for many years, covering a multitude of persons, worked out by a boy of seventeen! Compiled in a little over a year, in a country sparsely settled, wild, and with the family widely scattered. It was exactly as afterwards found by the court in the partition suit, and all the "investigations" that Marcos has made since have not changed it, for the witness swears that the one he offers now is a copy of that one, and that it is correct.

It further appears (Rec., p. 358), that Marcos had a talk with Manuel, also of course before the suit of 1875. It was probably in 1874. To Manuel, Marcos submitted the list. And Manuel said the list (Rec., p. 359) was correct. With a correct and complete list vouched for by Prudencio and Manuel, in 1874, what further was there to be done by Marcos? Every child, grandchild and great grandchild had been worked out by Marcos at the age of seventeen. Why does he say that he has made a study since 1875? And is it not strange that he does not say that Prudencio or Manuel made the list, but that he made the list himself, and submitted it, and it was found perfect?

Marcos says the controversy in 1827 was on account of some claim that her children should inherit from Luis

Maria (Rec., p. 338). Then he says (Rec., p. 338) his knowledge about this controversy is "on account of the paper which my father had, in this paper I have today." The paper referred to was the will. The will makes no mention of children.

He says (Rec., p. 338) he thinks the controversy of 1827 was before the governor. He says (same page) he does not know whether the governor had anything to do with it or not. Yet all the time he had the paper in his possession, i. e., the will, with the petition to the governor and the governor's order. On page 341 of the record, he says the first partition suit was brought in 1875 or 1876, he thinks. He is not sure of the year. On page 347, he says the suit was brought early in 1875. He has become sure of the year, and even of the time of the year. On page 341 of the record, he is not sure of the year. If not sure of the year as to the suit, why so sure Prudencio told him in 1873? Again, Marcos says he had a second talk with Prudencio, probably in 1875. It may have been nearly a year before the partition suit. That suit, he had just said, was brought early in 1875. If this be true, he must have talked with Prudencio the second time in 1874, and not in 1875. All of which shows that he is not sure of his dates, which is not remarkable; but it is remarakble that at the same time he is so certain that he talked with Prudencio in 1873.

V.

The title involved in this suit is derived under the act of Congress of June 21, 1860, and in the grant made by

the Sixth Section of that act neither Antonio nor his heirs could have had any interest.

This point is discussed at length in the joint brief on this phase of the case filed by the plaintiffs, the Santa Cruz Development Co., and the Bouldin defendants, and we refer the court to that brief for our arguments on this point.

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No. 2719

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH E. WISE, et al,
Apellants,

vs.

CORNELIUS C. WATTS et al,
Appellees.

ADDITIONAL BRIEF FOR APPELLEES CORNELIUS C. WATTS AND DABNEY C. T. DAVIS, JR., WHO WERE THE PLAINTIFFS BELOW

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STATEMENT OF FACTS.

After the treaty of Guadalupe Hidalgo and the Gadsden Purchase, by which the United States acquired additional territory, there were numerous Mexican Grants, titles of which were unsettled. The United States, in order to determine the validity of these grants, in 1854 passed an Act wherein the Surveyor General of New Mexico was directed, under instructions of the Secretary of the Interior, to make investigations as to the titles and ownership of these grants and to report as to his proceedings and findings.

There was a certain grant known as Las Vegas, to which there were two claimants, one the town of Las Vegas and the other certain heirs of one Luis Maria Cabeza de Baca. This man had died in 1827, leaving surviving him, at the time now in question, eighteen children, sons and daughters, and their descendants. These children, claiming to be the heirs, by John S. Watts, an attorney at law, and as their attorney, made claim to the said Las Vegas grant, all as set out in full in the petition of Watts and the affidavits accompanying it. (Record, pages 165-173.) An alleged son of Luis Maria Baca, called Antonio, was not included.

The Surveyor General of New Mexico reported upon this grant, and Congress, in its investigations, having determined that the title of the Baca claimants was meritorious, but having also determined to confirm the grant in the other claimant, the Las Vegas town, on the 21st of June, 1860, passed an Act, by the Sixth Section of which it is provided:

> "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number * * * That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this Act and no longer."

In 1862, John S. Watts, still acting for the heirs of Baca, made selection as the third of the series a tract of land situate in the present state of New Mexico, known as Bosque Redondo. This selection was, a short time afterward, with the consent of the Government, rescinded and abandoned and went for naught.

On the 17th day of June, 1863, Watts, still acting for the heirs of Baca, and as their attorney, selected as Location No. 3 of the Baca series a tract of land in the present state of Arizona, and being the land involved in this litigation. This selection was approved by the proper officials. In the selection the land is described as follows:

> "Commenging at a point one mile and a half from the base of the Salero Mountain, in a direction North fortyfive degrees East of the highest point of said mountain, running thence from said beginning point West," etc.,

so as to take in a tract a little more than twelve miles square and comprising almost one hundred thousand acres.

Between the dates of the abandonment or recission of the first or Bosque Redondo selection, which was in February, 1863, and the selection of Location No. 3 in Arizona, the said John S. Watts, claiming to be the owner of an unlocated float of the Baca heirs, executed to William Wrightson, in consideration of the sum of $110,000, a paper called a Title Bond, in which he sold to said Wrightson the said unlocated tract, with all of its privileges. The particular tract, that is to say, the number of the selection or location, is not mentioned in this instrument. (Record, pages 183-185.) Later on, however, on the 27th of March, 1864, Watts wrote Wrightson a letter in which he says that he encloses the certificate of the Register and Receiver in New Mexico that the location made in Arizona was made in compliance with the Act, and that he hopes this certificate will enable Wrightson to get the location confirmed. Upon this letter, which is now on file in the Land Office at Washington, are certain endorsements, which show that the certificates that Watts enclosed related to Location No. 3 in Arizona. (Record, page 191.) Later still, in a letter written by Watts to

the Commissioner of the Land Office, on April 30, 1866, in regard to Location No. 3, Watts speaks of Mr. Wrightson as having been killed by the Indians while he was making an examination of Location No. 3 in Arizona. These matters show that the title bond given by Watts to Wrightson, in March, 1863, referred to Location No. 3 in Arizona, the land here in question.

On the first of May, 1864, the heirs of Baca, and being the same heirs who had made claim to the Las Vegas Grant, as heretofore mentioned, conveyed to Watts Location No. 3 as selected June 17, 1863. The description of boundaries is the same, that is, commencing at a point one and one-half miles from the base of the Salero Mountain, in a direction North forty-five degrees East of the highest point, and running thence so as to take in a body of one hundred thousand acres, as before stated. There are some imperfections in the execution of this deed but the deed purports to be executed by all eighteen of the heirs who had made claim to the Las Vegas Grant, as before stated. This conveyance covers other lands than Location No. 3 as well, and is the first conveyance from the Baca heirs to Watts.

In 1866, Watts wrote the Commissioner of the General Land Office, saying that the 1863 location of the third of the Baca series had been made without a personal examination, and that a mistake had been made in the description as to the initial point. He asked leave for authority to amend or change the initial point of the boundary so as to make it commence at a point three miles West by South from the building known as the Hacienda de Santa Rita instead of a mile and a half Northeast from the highest point of the Salero Mountain. He concludes this application with the prayer that it is hoped that directions will be given to the Surveyor Gen-

eral "to correct the mistake." To this letter, the Commissioner replied in the same year, 1866, permitting Watts to correct the error and instructing the Surveyor General of New Mexico to cause the survey to be made in accordance with the amended description.

We have thus two descriptions of this selection, that of June 17, 1863, where the initial point is a mile and a half Northeast of Salero Mountain, and the amended description of 1866, where the initial point is three miles West by South from the building known as the Hacienda de Santa Rita. These descriptions largely cover entirely different lands, the amended description of 1866 being largely Northeast of the '63 description, there being a tract of some 6,000 acres only covered in common by both descriptions.

In 1870, one Hawley having come into possession of the Wrightson title bond heretofore mentioned, Watts conveyed to Hawley Baca Float or Location No. 3. The words of grant in this conveyance are "remise, release and quit-claim unto the said party of the second part and to his heirs and assigns forever, all that certain tract, piece or parcel of land," etc. The description of the property conveyed is, "all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains, in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the first day of May, A. D. 1864, bounded and described as follows: Beginning at a point West by South from the building known as the Hacienda de Santa Rita, running thence," etc., * * * "The said tract of land being known as Location No. 3 of the Baca Series." (Record, page 194.) The omission in

the description so quoted refers to the courses and distances covering a tract of land practically twelve miles square.

In 1871, the Baca heirs, that is to say, the eighteen children of Luis Maria Baca and their descendants, who had made claim to the Las Vegas Grant, as before stated, and purporting to be all of the children and descendants of Luis Maria Baca, conveyed to Watts, Location No. 5 of the Baca series, and in this conveyance is added the following:

"And the said heirs of Luis Maria Baca above mentioned now ratify and confirm the title made by our attorney Tomas Cabeza de Baca to John S. Watts, his heirs and assigns, on the first day of May, 1864, * * * for Location No. 3, situate in Arizona Territory * * *; and the said heirs of the said Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described."(Record, page 202.)

The title that Hawley obtained in 1870 is now vested by mesne conveyances in the plaintiffs and appellees, Cornelius C. Watts and Dabney C. T. Davis, Jr., as to the South one-half of the tract, and in the Bouldins, defendants and appellees, as to the North one-half.

In 1884, John S. Watts having died, his heirs executed what purports to be a deed of an undivided two-thirds interest in Baca Float No. 3, with the outboundaries of the 1863 selection, to one David W. Bouldin. In this conveyance was included a power authorizing the said Bouldin to sell and convey the whole of the tract. Under this conveyance, the appellant, Joseph E. Wise, is claiming by mesne conveyance, and likewise the appellees, Bouldins, are also claiming.

From 1866, the date Watts filed his petition asking the Land Office to permit him to change the description of the outboundaries of selection No. 3, until July 1899, the description as amended was recognized by the Land Department as the description of the Float. There never had been a survey. The first and only survey was made in 1905. In 1899, however, the Secretary of the Interior decided that the amended description of 1866 was invalid and that the claimants would be relegated to the description contained in the application of selection of June 17, 1863. The reason given for this by the Secretary was that the granting act of 1860 fixed a limit of three years in which the selection must be made, and that the amended description of 1866 was in fact a location of the lands taking in new lands, and as to these new lands void because they were not taken within the three-year period. The amended description was, therefore, held of no avail, and, as just stated, the parties were relegated to the original outboundaries.

In October of 1899, the heirs of John S. Watts again conveyed this land to Mr. Vroom, describing the outboundaries according to the 1863 selection. It is under this deed that the defendant and appellant, Santa Cruz Development Company, claims.

It will appear, therefore, that there are three chains of title, all eminating from John S. Watts. (1) The plaintiffs', Watts and Davis, title under the Hawley deed of 1870, under which title also the Bouldins claim the North one-half. (2) Those claiming under the deed from the heirs of John S. Watts to Bouldin, in 1884. Under this conveyance the Wises are claiming and also the Bouldins. (3) The deed of 1899, from the heirs of John S. Watts to Vroom, under which the Santa Cruz Development Company is claiming.

In addition, the appellant Wise claims under an alleged nineteenth child of Luis Maria Baca, the original Baca, called Antonio. None of the other parties claim under this alleged Antonio and maintain that there was no such person and that if there was, neither he nor his descendants made claim to the Las Vegas lands, which are the foundation of title of the lands here involved.

In 1914, the United States Supreme Court directed that the survey of the float made in 1905 be filed in the General Land Office. This was done, and thereupon and for the first time the lands involved were segregated from the public domain.

In 1914, Watts and Davis brought this action in the District Court for the United States in Arizona, making all of the other parties defendant. The judgment of the lower court was that the title obtained by John S. Watts from the heirs of Baca by the deeds of 1864 and 1871, passed to Hawley in 1870, and that the title thus passed was then vested in the plaintiffs for the South one-half of the Float and in the Bouldins for the North one-half of the Float. The court also found that there was a son called Antonio, making the nineteenth child of Luis Maria Baca, and that the defendants and appellants Wise had, by various convences, obtained that title, and that all of the Wises, Joseph E. and his wife, and Margaret, the wife of Jesse Wise, owned an undivided one-nineteenth of the whole of the Float. The court held that all of the title of John S. Watts passed out of him into Hawley in 1870, that the Bouldins obtained no title from the heirs of Watts in 1884, and that likewise Vroom obtained no title from these same heirs in 1899.

From this decision, the plaintiffs have appealed, and also the Bouldins, only from that part of the judgment awarding the Wises an undivided one-nineteenth of the

Float; the Wises have appealed from the whole judgment and so has the Santa Cruz Development Company.

It will be seen from this statement of facts that the first thing to be determined is, when the title of the Baca heirs, who, it is conceded by all the parties, had the title and conveyed it to Watts, save and except the alleged one-nineteenth of the alleged Antonio, when this title passed out of Watts. If all of Watts' title passed to Hawley in 1870, obviously any conveyances thereafter made by the Watts heirs conveyed nothing.

ARGUMENT.

IT WAS THE INTENTION OF JOHN S. WATTS TO CONVEY TO HAWLEY IN 1870 ALL OF HIS, WATTS, TITLE IN BACA FLOAT NO. 3.

It will be remembered that in 1864 the heirs of Baca conveyed to Watts, Baca Float No. 3, by the same description contained in the selection of 1863. Objections have been made, that the deed of 1864 to Watts did not carry all of the Baca title, because the deed was in part, and by some of the heirs, improperly executed, and because a certain alleged son of Baca, called Antonio, did not join. For the purpose of the present argument, we will treat the 1864 deed as having conveyed the Baca title to Watts, and take up the remaining questions later on. The controversy, therefore, is over the construction of the deed of 1870, from Watts to Hawley. It is contended on the one hand by Watts, Davis, and the Bouldins, that this deed conveyed all of Watts' title to Float No. 3 as it was originally selected in 1863, and is now finally fixed by the survey of 1905, on the face of the earth, by whatever outboundaries described in the deed; and on the other hand, by Wises and the Santa Cruz Company that it conveyed only the lands within the metes and bounds

given, namely, the selection of 1866, except as to the overlap. The question is whether Watts conveyed the 1863 or the 1866 location.

The primary rule of construction is to ascertain the intent of the grantor. This once ascertained it will control, without regard to technical rules of construction. There are certain secondary rules, which are resorted to, to ascertain the intent, where it may be in doubt. These rules, so far as applicable here, are:

(a) A deed should always be construed to take effect, rather than to fall.

(b) If a deed will admit of two constructions, it should be construed most strongly againt the grantor.

(c) Falsa demonstratio non nocet.

(d) In the construction of a deed, the court will place itself in the place of the grantor for the purpose of discovering his intention, and then, in view of all the facts and circumstances surrounding him at the time of the execution of the instrument, consider how the terms of the deed may affect the subject matter.

Let us then consider the facts and circumstances surrounding John S. Watts at the time of the execution of this paper, and then the terms of the instrument itself.

On the 2nd day of March, 1863, after the abandonment of the Bosque Redondo selection, and before the selection of June 17, 1863, in Arizona, John S. Watts, in consideration of $110,000, sold to Wm. Wrightson, one of the unlocated Floats. The conveyance recites the granting Act of June 21, 1860, to the Bacas, that Watts has full authority to make the location and cause to be made a title in fee for same after location and survey. And Watts binds himself, his heirs, etc., "to make a full and complete title in Fee Simple for said land to said William Wrightson, his assigns or legal representatives whenever thereunto required." (Record, pages 183-4.)

This bond does not designate any particular selection, but, on March 27, 1864, Watts wrote to Wrigtson, enclosing him certificate of the Register and Receiver at Santa Fe, to the effect that the location made in Arizona was conformable to the Act. "I hope this certificate will enable you to get the location confirmed." The letter and certificate found their way to the General Land Office, and were there filed May 26th, 1864, and endorsed: "Received at the Gen. Land Office, Washington, D. C. May 26, 1864. John S. Watts, Santa Fe, N. Mex. Mar. 27/64. Encloses a certificate of the Regr. at Santa Fe, N. M. to a Location No. 3, for the Heirs of Luis Maria Cabeza de Baca, in Arizona. File with Case. Hawes." (Record, page 191.)

Under the granting Act of June 21, 1860, the Bacas were permitted to select only "vacant land, not mineral." Pursuant to instructions of the General Land Office, the Register and Receiver of the Land Office at Santa Fe were required to certify that the lands were such as might be selected. The certificates of the Register and Receiver, in regard to Location No. 3, in Arizona, were made on March 27, 1864. (See opinion Secretary of the Interior, written by Justice Van Devanter of the Supreme Court, then Asst. Atty. Gen'l., 29 Land Decisions, page 46, which, by stipulation, is regarded in evidence.)

The certificates sent by Watts to Wrightson, March 27, 1864, were the certificates as to selection No. 3.

Also in a letter written by Watts to the Commissioner of the Land Office, April 30, 1866, (Record, pages 176-7) in regard to this selection, Watts says that Wrightson, while making an examination of Location No. 3, in order to have the location surveyed, discovered that a mistake had been made in the description.

Also it appears that the most prominent land mark near Location No. 3 is Mt. Wrightson, doubtless named after

the Wrightson of the title bond. (Record, page 239.) It is not a common name.

It would thus appear that the unlocated Float, mentioned in the title bond to Wrightson, was Location No. 3.

The original title bond was in possession of Watts and Davis, plaintiffs below, the grantees of Hawley, and was by them offered in evidence. The history of the paper is, that it was in all probability delivered by Wrightson to Hawley, for it is proved to have been in the possession of James Eldredge (Record, page 187), who was the attorney-in-fact of Hawley, and who, as such attorney, conveyed Hawley's title in No. 3 to Robinson. (Record, page 207, for Power, Hawley to Eldredge, pages 208 et seq., for Hawley deed to Robinson, executed by Eldredge.) From Eldredge the paper came down, with the title deeds to Watts and Davis.

When John S. Watts therefore, June 17, 1863, made selection of Location No. 3, he made it in reality for Wrightson and his assigns. This selection then, "commencing at a point one mile and a half from the base of the Salero Mountain in a direction North forty-five degrees, etc.," commonly known as the Location or Selection of 1863, belonged to Wrightson and his assigns when made. It is true, the title was still in the Bacas but Watts had bound himself to make fee simple title, when demanded.

Watts, undoubtedly in conformity with his covenants in the title bond, on the 1st of May, 1864, obtained the Baca title to No. 3, describing the outboundaries as in the selection. Watts was now in a position to fulfill his covenant to make fee simple title.

Only a short time before, it will be remembered, March 27, 1864, he had sent Wrightson the certificate by the Register and Receiver for No. 3. Sometime after this, but prior to April, 1866, Wrightson, while on Location No.

3, in order to have it surveyed, was killed. Watts did not convey to Wrightson, and the title bond, as have heretofore been shown, came into the hands of Hawley.

By reason of the fact that this bond could be transferred, without writing, and merely by delivery, it is somewhat difficult to trace it. That it could be so transferred, see authorities in main brief.

In 1866, Watts wrote to the Commissioner of the Land Office (Record, page 176), saying in brief, that June 17, 1863, he made selection of a body of land under the Act of 1860. (This was No. 3.) That because of the existence of war a personal examination of the country had not been made at the time of the selection, and that when Mr. Wrightson made an examination later with a view to a survey, it was discovered that a mistake had been made in the boundaries. Under these circumstances he asked leave to change the initial point of the boundaries so as to "commence at a point 3 miles West by South from the building known as the Hacienda de Santa Rita," running thence to take in a tract of the same size as the original. He says further, that this description will take in the land that "was believed to have been located upon" in the first place. He asks that instructions be given the Surveyor General "to correct the mistake."

The Commissioner granted the request, and directed the Surveyor General, May 21, 1866 (Record, pages 177-178) to make the survey, 'in accordance with the amended description." The survey, however, was not made.

The facts and circumstances surrounding John S. Watts, in 1870, at the time of his conveyance to Hawley, were:

(1) As far back as 1863, Watts had bound himself, in consideration of $110,000, to make fee simple title to Wrightson or his assigns of one of the unlocated Floats of one hundred thousand acres.

(2) The parties had afterwards settled, if it was not agreed at the time, that this should be Location No. 3, in Arizona, for we find Watts sending Wrightson the certificate of the Register and Receiver for this location, and we find Wrightson on No. 3, preparing to survey it.

(3) It is also established by J. Ross Brown's book on Arizona, published about 1865, and in evidence in this case, that Wrightson was on Location No. 3, mining and developing it.

(4) Watts, pursuant to his covenant to make fee simple title to Wrightson or his assigns, obtained title to No. 3 from the Bacas May 1, 1864.

(5) After this conveyance to him, and prior to 1866, Watts through Wrightson, discovered an error in the description, made it known to the Land Office, and obtained the correction.

(6) Hawley had succeeded to the Wrightson bond, and Watts was bound to give him title.

With these circumstances surrounding him, Watts executed the deed of 1870 to Hawley. This deed, in part, is:

> "* * * the said party of the first part (Watts) for and in consideration of the sum of one dollar and other valuable consideration (The title bond. This inserted by us.) lawful money of the United States of America * * * has remised, released and quit-claimed and by these presents do remise, release and quitclaim unto the said party of the second part (Hawley) and to his heirs and assigns forever, All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States, and by the said heirs conveyed to the party of the first party by deed dated on the 1st day of May A. D. 1864, Bounded and described as follows: Beginning at a point three miles

West by South from the building known as the Hacienda de Santa Rita, running thence," twelve miles, etc., so as to take in the one hundred thousand acres. "The said tract of land being known as Location No. 3 of the Baca Series."

In 1870, it was believed that the outboundaries of the Float were as set forth in this deed. The Government, from 1866 to 1899, regarded this as the situs of the land, the erroneous ruling of 1866 not being corrected until this date.

Under these circumstances, and under such a deed, did Hawley acquire the title granted to the Baca heirs by the United States, and by them conveyed to Watts, or did he only acquire the lands within the metes and bounds of the 1866 correction, which includes but a fragment of the lands granted to Watts? In other words, could Watts himself, had he lived to learn of the error of the Government in 1866, in permitting an amended description, and of his own error, have claimed as against Hawley, that he did not convey Baca Float No. 3, but only a fraction of it?

When Watts made this deed in 1870, he knew he had given Wrightson the title bond for an unlocated Float; he knew that this Float had been selected in 1863 and called No. 3; he knew he had acquired title from the Bacas to No. 3 that he might carry out his bond; he knew that the Wrightson bond had come to Hawley. It is unbelievable, that Watts, a lawyer, a member of the Supreme Court of New Mexico, a Congressman, would have dealt with Hawley, unless Hawley had the bond.

Watts knew, that in 1866, at his own instigation, the description had been amended, and he believed the amended description was correct. He was bound to convey Location No. 3, and he believed it occupied a certain place on the earth's surface. Knowing and believing these things, he conveyed, the one hundred thousand acres, granted by

the United States to the Bacas, by the Bacas granted to him in 1864, by the description then believed to be correct; and then granted the same thing, by another description which he himself had caused to be made, and by him believed to be correct. We have no doubt that Watts died, believing he had sold Baca Float No. 3, by the correct description.

What Watts intended to convey was the location, the Baca right, the thing the Bacas got from the Government. The land had never been surveyed; it was in a wilderness, infested with savages. He had bound himself to sell one of the unlocated Floats; he had located it, amended it, with the consent of the Government, and believed he was in good faith fulfilling his bond. Certainly no chicanery or bad faith is to be imputed to him, which would be the case if it were held that he did not intend to convey the Float.

When Watts made this deed there was no apparent error. The land was the land granted to the Bacas and by the Bacas to him. He had amended the description merely to make the hundred thousand acres lie where he originally believed it was. He did not get another deed from the Bacas to cover the amended description, because he got from the Bacas Float No. 3, their right to the thing, and he believed he had a right to have its boundaries corrected. The Government thought so, too, and let him amend. As Watts saw the light, he made no error in his conveyance to Hawley. He intended to convey Baca Float No. 3, and he did so.

Years after 1870 and Watts' death, in 1899, the Government held the amendment was an error. In view of this ruling, and the relegation of the parties to the selection of 1863, what actual, however unintentional error, is there in the deed of 1870?

In the light of subsequent events there is no error in the

thing conveyed, but only in the description of it. Watts conveyed one hundred thousand acres, being the same one hundred thousand acres granted by the Government to the Bacas, and by them conveyed to him May 1st, 1864. It is the tract known as Location No. 3 of the Baca Series. This hundred thousand acres is given outboundaries according to the amendment of 1866. What is the error? There is no error as to the amount of land; it is one hundred thousand acres. There is no error as to what hundred thousand acres. It is that granted by the Government to Bacas, and by them to Watts. The error is not as to the thing granted but only as to where it is. It is Baca Float No. 3 that is granted, but by the metes and bounds it is put in the wrong place. The real fundamental intent was to grant all the rights of Bacas and all the rights of Watts, and this was done, merely with an error (as it developed afterward), a mistake, as to outboundaries.

Discarding the error, there is plenty left in the deed to sustain it. It is that certain tract of land, of one hundred thousand acres, granted to Bacas, granted to Watts, granted to Hawley, known as Location No. 3 of the Baca Series. There was only one No. 3. Its outboundaries might have been uncertain until the survey of 1905, indeed they were, but no uncertainty existed that the Government had granted one hundred thousand acres, that the name of that grant was Baca No. 3, that the Bacas conveyed it to Watts, and Watts to Hawley. Watts intended to convey the Float to Hawley and effectually did so, although part of the description was false. As a matter of law there never was an amendment, and all description based on it is false. But always there was the grant, the right to the Bacas, to Watts, to Hawley, always there was but one No. 3, and this was the real thing bought and sold, whatever its outboundaries.

NOT ONLY DID HAWLEY OBTAIN BACA FLOAT NO. 3 FROM WATTS, BUT ALSO THE DEED GIVEN BY THE BACAS TO WATTS IN 1871, INURED TO HAWLEY'S BENEFIT.

In the beginning of the argument under the preceding head, it was stated the objections were made as to the form of execution of the deed of 1864, by the Bacas, to John S. Watts. In 1871, Watts obtained a deed from the Bacas of Location No. 5 of the Series, and in this deed is the following: "and the said heirs of Louis Ma. Baca above mentioned, now ratify and confirm the title made by us by our attorney, Tomas Cabeza de Baca to John S. Watts, his heirs and assigns on the 1st day of May, 1864, for the lands described in * * * * Location Number Three situate in Arizona Territory, containing * * * * 99.289 39/100 acres, the boundaries of which are set forth and described in said deed; and the said heirs of the said Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quit-claim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described." (Record, page 202).

It is conceded that this deed cures the imperfections in the execution of the deed of 1864, and that it was signed by all of the heirs, except the alleged Antonio, or nineteenth child. Therefore, if this deed inures to the benefit of Hawley, the imperfections in the deed of 1864 become immaterial.

The character of the deed of 1870, from Watts to Hawley, will determine whether any subsequent title acquired by Watts inured to Hawley. If the deed of 1870 were a mere quit-claim of the right, title and interest of Watts, then any subsequently acquired title by Watts would not relate back, and inure to Hawley. if, on the other hand, the

deed carried the fee of the land itself, all subsequently acquired title would relate. The question then is whether the 1870 deed was a quit-claim or not.

The distinction between a quit-claim and a purported conveyance of the fee is: A quit-claim merely carries the chance of title, "the right, title and interest," of the grantor, whatever that may be; a conveyance that purports to convey the land itself, and not a chance to it, is not a quit-claim.

"In that case Chief Justice Roberts draws a distinction between a mere quit-claim deed and a conveyance such as the one under consideration, which purports to convey, not the chance of the title, but the land itself. Citing with approval the case of *Van Rensselaer vs. Kearney*, already emphasized by us, he contrasts the quit-claim, conveying no more than the present interest of the grantor, and inoperative to pass an interest such as may afterwards vest,' with a conveyance which though without covenant of warranty, yet purports to convey the absolute right of the land and therefore sufficient, 'as we infer,' to pass an after acquired title. To the same purport are the cases of *Taylor vs. Harrison*, 47 Texas 460 and *Richardson vs. Levi*, 67 Texas 363."

Lindsay vs. Freeman, 18 S. W. Rep. 727, Supreme Court of Texas.

Also see *Van Rensselaer vs. Kearney*, 11 Howard 322, *Balch vs. Arnold* (Wyo.), 59 Pacific 434.

In *West Seattle vs. Novelty Co.*, 31 Wash. 435, the Court say of a deed which provided: "Said party of the first part * * * do by these presents, remise, release and forever quit-claim unto the said party of the second part his heirs and assigns, all those certain lots, etc."

"The deed in question purports to convey more than a release of the grantor's claim at that time. It conveys the

land itself, for it recites that the party of the first part does remise, release, and forever quit-claim to the party of the second part the lands described, "to have and to hold all and singular the said described premises, together with the appurtenances unto said party of the second part and to his heirs and assigns forever," In *Ankeny vs. Clark*, 1 Wash. St. 549, 20 Pac. 583, the Supreme Court of the territory said: * * * Under the statutes of our territory, a quit-claim deed is just as effectual to convey the title to real estate as any other form or deed, and a grantee in a quit-claim deed is entitled to the same presumptions as to bona fides—has the same rights—as a grantee in a deed of general warranty. This is undoubtedly true of a quit-claim deed which purports on its face to convey, not merely an interest, but the real estate itself.' See also: *Taggart vs. Risley*, 4 Or. 235; *Garrett vs. Christopher*, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 858; *Balch vs. Arnold* (Wyo) 59 Pac. 434; *Field vs. Columbet*, 4 Sawy. 523, Fed. Cas. No. 4,764; *Spies vs. Neuberg* (Wis.) 37 N. W. 417, 5 Am. St. Rep. 211."

The deed of Watts to Hawley of 1870 reads: "that the said party of the first part * * * has remised, released and quit-claimed, and by these presents do remise and quit-claim unto the said party of the second part, and to his heirs and assigns forever; all that certain tract," etc.

The deed is not a quit-claim, but purports to pass the fee simple title, and therefore carries after acquired title.

In 1865 there was passed in Arizona the following Act:

"If any person shall convey any real estate purporting to convey the same in fee simple absolute and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal

estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

Howell Code, page 279.

This act was in force in 1870, and for many years afterward. For construction of statute see *Bogy vs. Shoab,* 13 Mo. 627, and *Frink vs. Darst,* 14 Ills. 304. In these cases it is held that a deed that purports to convey the land, and not a chance to the land, such as "right, title and interest," is within the terms of the Statute.

The deed of 1870 is not a quit-claim, but purports to convey the land itself. All title Watts acquired, therefore, by the deed of 1871, immediately inured to Hawley. This renders unnecessary any discussion of imperfections in the 1864 deed.

But the deed of 1871 from the Bacas to John S. Watts is more than a present conveyance. In it the grantors, "ratify and confirm the title made by us and our attorney." The deed of 1864 purports to be signed by all of the eighteen children of Luis Maria Baca, or their descendants. In 1871, this deed is ratified and confirmed. All of the heirs in 1871, recognize that in 1864 title passed, and now, to cure any errors, or irregularities, ratify and confirm the conveyance made then. Watts really got no new title by the latter deed but only a ratification of what he already had. All this, by relation, he had passed to Hawley.

Thus the title of all the Baca heirs passed to Hawley, except that of the alleged son, Antonio. The matter of Antonio is discussed in a separate brief. From Hawley,

the title passed to Watts and Davis, by mesne conveyances, to the South one-half and the Bouldins to the North one-half.

Respectfully submitted,

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HERBERT NOBLE
S. L. KINGAN,

Solicitors for Appellees, Watts and Davis.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

CORNELIUS C. WATTS, et al.,
Appellants,

—vs.—

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

No. 2719.

BRIEF FOR JOSEPH E. WISE AND MARGARET W. WISE, APPELLEES, ON THE 1-19 INTEREST OF THE HEIRS, ETC., OF ANTONIO BACA.

SELIM M. FRANKLIN,
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STATEMENT OF THE CASE

This is a suit to quiet title brought by Cornelius C. Watts and Dabney C. T. Davis, Jr., as plaintiffs, against all the defendants.

The court decreed title to an undivided 1-38 interest

to be in defendant Joseph E. Wise; 1-38 interest in Margaret W. Wise; 18-19 interest in the south half in plaintiffs, and 18-19 interest in the north half in defendants Bouldin.

The defendants Joseph E. Wise and Lucia J. Wise, his wife, have appealed from this decree. The plaintiffs, Watts and Davis, and defendant Bouldin have appealed from that portion which adjudges Joseph E. Wise and Margaret W. Wise to be the owners each of an undivided 1-38 interest, or a total of 1-19 interest in the tract in dispute. The defendant Santa Cruz Development Company has also appealed.

Joseph E. Wise, upon his appeal, has heretofore filed a brief as to the 18-19 interest in the entire tract, decreed to plaintiffs and Bouldins. He now files this brief for himself and Margaret W. Wise, as to the 1-19 interest decreed to them, and he asks that this brief be considered as being filed both in his own appeal, and also as a reply brief to the brief filed by plaintiffs, Bouldins and Santa Cruz Development Company, in the matter of their appeals, which involve the title to this 1-19 interest.

The tract in dispute was granted by Congress to the heirs of Luis Maria Baca.

The tract of land in dispute was granted by Act of Congress of June 21, 1860, (12 Stat. at L. 71, Chap. 167) to the heirs of Luis Maria Baca. Luis Maria Baca died in New Mexico in 1827, leaving a will, dated May, 1827.

On September 12, 1827, Jose Miguel Baca, brother of the deceased, executor under the will, presented the same to the governor of the Territory of New Mexico, in the then Republic of Mexico, for probate, and on that day, the governor declared the same to be valid. The petition and order validating the will, and the will itself, are all in one document, Defendants Wise Exhibit 39, Tr. p. 345-442.

The petition of the executor to the Governor, which is annexed to the will, Wise Exhibit 39, Tr. 448, states that Francisca Garviso, who was the wife of a son of the deceased, wished to participate in the property with the other heirs. The order of the Governor thereon, (Tr. p. 452), directs the Alcade of Cochite to hear the matter, "with the understanding that if anything was given in the lifetime of her deceased husband shall be deducted from what was coming to him by the death of his father." This ancient document, therefore, conclusively established the fact that Luis Maria Baca had a son who died **before** he did, and that Francisca Garviso was the widow of this deceased son.

The plaintiffs introduced in evidence a petition filed with the Surveyor General of New Mexico in the year 1860, by John S. Watts, as attorney for certain heirs of Luis Maria Baca, wherein he asked for the confirmation of the Ojo del Espiritu Santa Grant, Plaintiffs' Exhibit E, Tr. p. 165.

In this petition John S. Watts, amongst other things, says:—

"Your Petitioners further state that at the death of the said Luis Maria Cabeza de Baca, **he left surviving him as his heirs,** the following children, to wit: (1) Luis Baca, (2) Prudencio Baca, (3) Jesus Baca, Sr., (4) Jesus Baca, Jr., (5) Felipe Baca, (6) Domingo Baca, (7) Manuel Baca, (8) Josefa Baca y Salas, (9) Josefa Baca y Sanchez, (10) Juan Antonio Baca, (11) Jose Baca, (12) Jose Miguel Baca, (13) Ramon Baca, (14) Matio Baca, (15) Guadalupe Baca, (16) Altagracia Baca, (17) Rosa Baca, (18) Juana Paula Baca." Tr. p. 167.

This statement on the part of John S. Watts, as attorney for the heirs, made in 1860, is **that the said Luis Maria Baca left eighteen children surviving him.** As the will of Baca showed that Luis Maria Baca had one son who died before he did, he must have had nineteen children; of whom, as stated in the petition of Watts, eighteen survived him; and, as stated in the will, one died before he did. The question of fact was then presented upon the trial, as to who the nineteenth son was, who died before his father, leaving a widow by the name of Francisca Garviso.

Joseph E. Wise and Margaret W. Wise produced evidence which proved that the name of this son was Antonio Baca; that this Antonio Baca left a son by the name of Juan Manuel Baca; that this Juan Manuel Baca died leaving a son, Jose Baca, and a daughter, Preciliana Baca, both of whom were dead, and whose heirs conveyed all their interest in the lands in question, by

mesne conveyances, to said Joseph E. and Margaret W. Wise.

The lower court, finding as a fact that Antonio Baca was the son who died before his father, leaving heirs who had conveyed all their interest to JosephE. and Margaret W. Wise, rendered its decree adjudging the 1-19 interest of the heirs of this son Antonio, to be owned in fee by Joseph E. and Margaret W. Wise.

Plaintiffs, the Bouldins and Santa Cruz Development Company, have each appealed from this part of the decree. They each attack it on two grounds, to wit:

(1) That defendants Wise wholly failed to prove there was a son and heir named Antonio Baca.

(2) That if there was such a son, neither he nor his heirs, derived any title under the Act of June 21, 1860.

The first point requires a consideration of the evidence in the case; the second point involves the construction of the Act of Congress of June 21, 1860.

I.

The evidence proves conclusively that Antonio Baca was the son of Luis Maria Baca who died before his father, leaving a son whose descendants have conveyed to defendants Wise.

It was conclusively proved by the will of Baca, as hereinbefore stated, that in addition to the 18 children **who survived** him, as proven by plaintiffs, (Tr. 167),

he had another son who died before he did, and that this deceased son left a widow by the name of Francisca Garviso. Evidence was introduced by defendants Wise to prove that this son was Antonio Baca; the husband of said Francisca Garviso; under whose descendants Joseph E. Wise and Margaret W. Wise deraign their title to this 1-19 interest.

This evidence consists of (1) the testimony of the witness Marcos C. de Baca; (2) Corroboration of his testimony by evidence in possession and control of plaintiffs which they refused to produce upon the trial; (3) the deeds executed by the descendants of Antonio Baca.

In addition to this evidence there was other evidence which the court did not allow defendants Wise to introduce, for reasons hereinafter set forth, to wit, (a) certified copy of an ancient document signed in 1879 by Prudencio Baca, now deceased, a son of Luis Maria Baca, and filed in the District Court of the Territory of New Mexico, which contained a full family tree of all the descendants of Luis Maria Baca, including this son Antonio and his heirs. This document being an ancient writing, more than thirty years old, and Prudencio Baca being dead, was admissible as evidence of pedigree. (b) Certified copy of the judgment of the District Court of New Mexico, in the suit of Perea et al. v. Sulzbacher, et al., being a suit for partition of Baca Location No. 1, in which judgment that court decreed that Antonio Baca was a son of Luis Maria Baca, who dying left a son Juan

Manuel, who had two children, etc., as testified to by Marcos C. de Baca in this case.

We will first consider the evidence which the court permitted appellees Wise to introduce upon the trial.

The Evidence of the Witness Marcos C. de Baca.

Marcos C. de Baca, a witness for defendants Wise, testified: That he was fifty eight years old; was born and lived in New Mexico, and practised law since 1891, for three years had been a translator in the U. S. Land Office in New Mexico; that he is a son of Tomas C. de Baca, who, as attorney in fact for a great number of the heirs of Luis Maria Baca, executed the deeds of 1864 and 1871 to John S. Watts; that he is a grandson of Juan Antonio Baca, who was a son of Luis Maria Baca, and therefore that he is a great grandson of Luis Maria Baca. (Tr. p. 329-330); that for many years he has been gathering data in regard to the descendants of Luis Maria Baca, (Tr. p. 330).

The various deeds in evidence in this case show that there are probably a few hundred of these descendants at the present time. The descendants of a man dying in 1827, who had nineteen children, all of whom were married and had children, would necessarily be very numerous. Of all of these descendants, the witness, Marcos C. de Baca, was best qualified to testify to the pedigree and family tree of the descendants of Luis Maria Baca, for the reason that for years he has been making and keeping a genealogy of the family. (Tr. p. 330). This

witness had no interest whatsoever in this case. He testified that he first met Joseph E. Wise in 1913; that witness was asked by Wise and told him who the heirs of Luis Maria Cabeza de Baca were, and that later witness agreed to obtain for Mr. Wise the deeds from the heirs of Antonio Baca, which have been offered in evidence; that the witness was paid for his services; but that the purchase price was paid directly to the heirs by Mr. Wise, through him; that the witness had no interest in the matter at all. (Tr. pp. 371-372). The deeds obtained by the witness were made first to the witness as grantee, and he immediately transferred the titles to Joseph E. Wise and Jesse H. Wise, Defendants Wise Exhibits 9, 10, 11, 12 and 13, (Tr. pp. 258-261).

We are making these statements because they were duly considered by the court in determining the interest and credibility of the witness.

The witness further testified that in 1873, he was living in the town of Pena Blanca with his father, Tomas C. de Baca; that he was then sixteen years of age, and had recently returned from the college he was attending in Missouri; (Tr. p. 347-371); that in this year, 1873, Prudencio Baca, son of Luis Maria Baca, then an old man of seventy years of age, came to the little town of Pena Blanca, from Loma Parda in Moro County, in the northern part of the Territory. (Tr. p. 350).

This was the same Prudencio Baca whose name is affixed to the ancient document containing the family tree of Luis Maria Baca, on file in the case of Perea vs. Sulz-

bacher, in the District Court of the Territory of New Mexico, about which more will be said in this brief.

Prior to the year 1873, to wit, in 1864, this Prudencio Baca had signed the first deed to John S. Watts (Tr. p. 154). The second deed to John S. Watts of date 1871, was not signed by Prudencio Baca. It was signed for him by Tomas C. de Baca, his attorney in fact, (Tr. p. 197). In 1873, John S. Watts had left New Mexico and taken up his residence in Illinois, (Tr. p. 297).

The witness Marcos C. de Baca met Prudencio Baca in 1873 at Pena Blanca, and inquired of him whom the children of Luis Maria Cabeza de Baca were, (Tr. p. 350); Prudencio Baca told him that Antonio Baca was the eldest child of Luis Maria Baca; and he also told him that Juan Antonio Baca was another child, being the grandfather of the witness, and also gave the witness the names of the other heirs, (Tr. p. 355). The witness testified he had conversations with Prudencio at different times, in regard to who the sons of Luis Maria Baca were; many conversations prior to Prudencio's death; (Tr. p. 337); that Prudencio told him that Antonio Baca, the first son of Luis Maria Baca, was the husband of Francisca Garviso, who was mentioned as the widow of the deceased son in the will of Baca, hereinbefore referred to. (Tr. 388). He further testified, in regard to his conversation with Prudencio:

> "I was showing Prudencio a list of the names of the family, as I have got them and was inquiring or him whether it was correct or not. In all the lists

that I made I always had the name of Antonio Baca as the first son of Luis Maria Cabeza de Baca. * * * He said it was a correct list of Luis Maria Cabeza de Baca's family * * * I have a list with me made at that time, but it is a copy of the one I made at that time. I have got several lists on scraps of paper * * *" (Tr. p. 356) "This I say, is a copy of the list I then submitted to Prudencio Baca. It contains not only the names of the sons, but the descendants of the sons, their wives and their children and grandchildren;" Tr. p. 357.

He further testified that he had a conversation in 1875, prior to the bringing of the partition suit, hereinafter referred to, with Manuel Baca another son of Luis Maria Baca, now dead, on the subject of Antonio; he had conversations with him at different times also, at Pena Blanca, Tr. p. 358. And Manuel Baca told him that Antonio was the eldest child of Luis Maria Cabeza de Baca, and that his list was correct. (Tr. p. 359). In 1893 or 1894 the witness had conversation with Domingo Baca, another son of Luis Maria Baca, also at Pena Blanca, (Tr. p. 359) and he told him that Antonio Baca was a son of Luis Maria Baca.

"QUESTION by the Court: I should like to know how you were interested in making these inquries. What prompted you to make these inquiries on these various occasions?

A. I had a notion to make a book of the family record from Luis Maria de Baca to the present genera-

tion—I had that notion in 1873 when I left school —I take it today when I find any member of the family that I haven't got in the book. I inquire from him who his children are, and I put them down." (Tr. p. 360).

"Q. Then you are not interested in the matter at all, except— A. No, sir, except to keep the record of the family; that is all." Tr. p. 361.

He further testified:

"I have been informed by Prudencio Baca, and by my father, that Antonio Baca was dead in 1873. * * * Prudencio Baca stated to me the name of the son of Antonio Baca; his name was Juan Manuel Baca. I did not know Juan Manuel Baca in his lifetime. I was told by Prudencio Baca, and by my father, and by Manuel Baca, that Juan Manuel Baca was dead prior to 1873 * * * I was told that Juan Manuel Baca was married and his wife was living at that time (1873); Prudencio Baca told me that," Tr. p. 363. "Prudencio did state the name of the wife at that time. The name he gave me was Feliciana Padilla," Tr. p. 363. "I made inquiry in regard to her, as to where she is; she is dead * * * I think she died about 1882. Baca left two children surviving him; the names of the children that Juan Manuel Baca left are Jose Baca and Preciliana Baca. Jose was a son and Preciliana was a daughter. Preciliana afterwards married. She married Mares, and her name thereafter

was Preciliana Baca Mares. I did know Jose Baca in his life time; he is dead; I think he died in 1905; he did leave children. I know his children. The names of the children of Jose Baca are Preciliana Baca, Esteban Baca, Francisco Baca, Luciana Baca, Pilar Baca, and Epigmenia Baca * * * These various persons whose names I have mentioned as the children of Jose Baca are the same persons who signed the deed to me, Tr. p. 366. Preciliana Baca is dead; she was married in her lifetime to Antonio Mares. I knew him; she left children; I know all the children she left. Their names are," etc. Tr. p. 367.

The witness testified he was the same Marcos C. de Baca to whom all these children executed deeds in evidence in the case, and the same Marcos C. de Baca who executed his deed to Joseph E. Wise and Jesse H. Wise. The witness then made a list of the children and descendants of Antonio Baca, and the same was received in evidence as a matter of convenience, and is set forth on page 368 of the Transcript.

The so-called controversy as to pedigree:

The testimony of the witness as to what Prudencio and other members of the family, told him in regard to Antonio and his descendants, was objected to by plaintiffs on the ground that there was a controversy at the time in regard to this Antonio. We will show, in the first place, that there was no controversy; and in the next place, that if there was, the statements of Prudencio Manuel were made to Marcos before any controversy started.

In the first place, opposing counsel assert that a controversy as to the pedigree of Antonio Baca arose in the proceedings under the will of Luis Maria Baca. The papers, however, themselves show there was no controversy on that subject. The widow of Antonio claimed something from the estate, and the executor claimed that as Antonio was indebted to the estate, this indebtedness should be paid out of what was coming to him, (Tr. p. 448). This claim the Governor order to be presented to the Alcalde of Cochite, with the understanding that if something was given to the deceased husband in his lifetime it should be deducted from whatever he was entitled to under the will, (Tr. p. 452).

Marcos C. de Baca on this point testified:

> "I never heard of a controversy as to whether or not Antonio Baca was or was not a son of Luis Maria Baca. There was no controversy before the Governor of New Mexico of the Mexican Republic as to whom the children of Luis Maria Baca were, or the grandchildren of Luis Maria Baca. As I have been informed, the controversy was between the wife of Antonio Baca and the administrator of Luis Maria Baca." (Tr. p. 339) * * * "It was on account of some debts that Antonio Baca was owing at the time of his death to Luis Maria Cabeza de Baca." (Tr. p. 340).

There was no question of pedigree involved under the will of Luis Maria Baca; there was a question of how much, if anything, Antonio owed his father's estate; but

that there was such a son was unquestioned by the executor; and that Francisca Garviso was his widow, was beyond dispute.

This disposes of the assertion made by opposing counsel that statements of the sons of Baca in 1873 and thereafter, were inadmissible, by reason of a controversy as to the pedigree of Antonio Baca in 1827. There was no controversy on that question in 1827.

The second controversy which opposing counsel refer to was the partition suit brought by Perea, et al., for the partition of Baca Float No. 1, p. 349. The witness Marcos C. de Baca, testified he had heard of this suit that he thought it was brought in 1875, (p. 346). He further testified, as to this:

> "I heard of the Perea lawsuit of 1875. I don't know whether lists of the heirs were submitted at that time or not. I suppose that was a matter which involved the whole Baca family. I don't know whether it did or not. I have never seen the record in that case, even today." (p. 373).

The first conversation the witness had with Prudencio Baca was in 1873, two years before that suit was brought, (p. 346), and the conversation with Manuel Baca was before the suit was brought, (p. 358). So that the statements as to pedigree, made by these two sons to the witness were **anti litem motam.**

Again, he testified he had conversation with various descendants of Luis Maria Baca down to the present

time. It is fair to presume that the partition suit brought in 1875 had long since gone to judgment.

There is no evidence, however, in this case, that the partition suit of Perea involved a dispute as to whether or not Antonio was a son. The witness on this point testified:

> "WITNESS: I said that I thought it was in 1875 that a partition suit was brought for the partition of Baca Location No. 1 in New Mexico, and for the partition of the Ojo del Espiritu Land Grant at that time. * * *
>
> Q. Now in 1875 and in 1874 and in 1873 you remember discussions do you not in your family and among the other members of the Baca family that you met, as to how they were going to divide up this grant No. 1, or this Ojo del Espiritu? A. No, sir. Q. No discussion was taking place? A. No, sir * * *
>
> Q. There was a controversy existing sometime previous to the bringing of the lawsuit wasn't there; a discussion and contention? A. Not that I knew * * *
>
> Q. Well, now, some of these Bacas in this lawsuit which you refer to were claiming some rights as against somebody else, weren't they? A. No, sir, I think that those rights were claimed by Don Jose Perea, who claimed to have purchased the interest of those Bacas.

Q. You don't happen to know, because you were so young at that time, how long anterior to that there had been any quarrel or any discussion or any contention between the parties? A. I never heard any." Tr. pp. 349-353.

The only evidence in the record in the present case, in regard to the partition suit brought in 1875, by Jose L. Perea, for the partition of Baca Location 1, was the testimony of this witness, Marcos C. de Baca; and he testified simply that he knew of the fact of such suit being brought, but had never investigated the records thereof, and knew nothing further about it. The mere fact of a partition suit being brought would not raise any presumption that one of the controverted questions of fact in that case was whether or not Antonio Baca was a son of Luis Maria Baca, or that Prudencio Baca, or Domingo Baca, or any of the other sons, were in fact, sons of Baca. Therefore, we say there is no evidence in this case to show that a dispute arose in that case, in regard to Antonio Baca; and the witness testified that he never heard of any controversy as to whether or not Antonio was a son of Luis Maria Baca, (Tr. p. 339). He was asked:

"Q. Now at the time you had these conversations" (referring to the conversations with his uncle Prudencio and other uncles) "was there any controversy that you know of, as to whether or not Antonio Baca was or was not a son of Luis Maria Baca? A. I never knew any controversy between the family." Tr. p. 337.

The pleadings in the partition suit of Jose Perea are not in evidence in this case; nor is any part of the record of that case in evidence here; what the issues of controversy were, we do not know, except that it was a suit in partition brought by one Jose Perea, against the heirs of Luis Maria Baca. For ought we know, it was alleged and admitted by all the defendant heirs in that case, if they were defendants, and we do not know whether they were or not; that Antonio was a son of Luis Maria Baca; and the controverted questions in the case might have been as to other children or grandchildren; or as to the validity of deeds; or there might have been no controversy at all.

It was shown during the trial that counsel for plaintiffs had in their possession a certified copy of the affidavit of Prudencio Baca which was filed in that partition suit; they knew of the suit, and if there was any issue or controversy in that case as to whether Antonio was a son, counsel for plaintiffs would undoubtedly have produced certified copies of the record of the case to show that fact.

Therefore, we submit: That there was no controversy in the partition suit of Perea in regard to Antonio Baca or his descendants being heirs of Luis Maria Baca, so far as the record before this court shows; for the only evidence is the testimony of Marcos C. de Baca, who denies there was such a controversy. Secondly, whether there was such a controversy or not, is immaterial, because the statements of Prudencio Baca and Manuel Baca

to the witness, were made long before the partition suit was brought. They were **anti litem motam** statements, and were admissible in evidence. 9 Ency. of Ev. 739; 16 Cyc. 1230.

The partition suit of Jose Perea was brought forty years ago. The case must have gone to judgment twenty or thirty years ago; the controversy in court, if there were a controversy, having been ended by judgment, the reason for excluding declarations made by deceased members of the family, while the controversy existed, no longer existed after that judgment. And the witness Marcos C. de Baca testified that he has, up to the present day, been making and keeping a genealogical record of the descendants of Luis Maria Baca, and never heard it controverted or denied by any of the descendants that Antonio Baca was a son. The witness testified he knew personally the present descendants of Antonio Baca, being the persons who executed deeds under which Wise claims title; they are over twenty in number. In each of these deeds, these twenty descendants recite as a fact that they are the children either of Jose or Preciliana, who were children of Juan Manuel Baca, who was a son of Antonio Baca, who was a son of Luis Maria Baca. Defendants Wise Exhibits 9-12, Tr. 258-260; and the recitals in those deeds of these present descendants corroborate the testimony of Marcos C. de Baca.

Presumption arising from possession of evidence by plaintiffs at the trial, which they failed to introduce.

During the trial of this case the plaintiffs admitted

having in their possession, and subject to their control, a certified copy of a portion of the record in the partition suit of Jose Perea, hereinbefore referred to. Tr. 328-453 454. This certified copy was admitted to be a copy of an affidavit signed by Prudencio Baca in 1879, as to the heirs of Luis Maria Baca. Counsel for Wise requested plaintiffs to produce this copy, which they refused to do; and the court would not require them to produce it (Tr. p. 328). Counsel for Wise asked for time within which he could obtain a certified copy of the statement of Prudencio Baca; as he understood that counsel had the original; this application was denied. (Tr. pp. 333-335). The statement or affidavit, being signed by Prudencio, the son, more than thirty years ago, and he being now dead, was competent evidence as to pedigree.

> "Statements in writing relating to pedigree made or recognized by members of a family, who are dead, are admissible in evidence * * * so also are entries in family Bibles, or other family records * * * old pedigrees and genealogical tables."
>
> 9 Ency. of Ev. 745.
>
> "An ancient document is admissible in evidence without direct proof of its execution, if it appears to be of the age of at least thirty years, is found in the proper custody, and is unblemished by alterations or otherwise free from suspicion; the instrument being said in such a case to prove itself."
> 17 Cyc. 443.

"Ancient documents have been admitted, not only as muniments of title, or as instruments under which the parties to the action in which they are sought to be introduced assert a claim, but also to show other facts which they recite even in actions between strangers to the instrument."

17 Cyc. 444.

After the submission of this case, but before the court had decided the same, counsel for Wise obtained a duly authenticated copy of the affidavit of Prudencio Baca filed in the District Court of New Mexico, in the partition suit before mentioned, and made written motion for leave to file the same, as evidence in this case; in which it was stated: "Said affidavit sets forth the names of all the children and descendants of Luis Maria Baca, and shows that Antonio Baca, also called Jose Antonio Baca, was a son of Luis Maria Baca; that said Antonio died leaving one legitimate child, to wit, Juan Manuel; that he died leaving two children, Jose Baca and Perciliana, who married Antonio Mares, (Tr. p. 434-435). The authenticated copy of the affidavit was deposited with the clerk, for the inspection of the court and counsel. (Tr. 435). The motion was thereafter denied by the court; exception taken, and this ruling of the court is assigned as error. Assignment of Error XIV, Tr. p. 565.

The fact, however, is shown conclusively by the record, that counsel for plaintiff did have in their possession during the trial, the certified copy of an ancient instrument which was signed by Prudencio Baca, and

which document was an affadavit in which Prudencio set forth the names of the sons and daughters of Luis Maria Baca, and their descendants, up to the date it was made, to wit, 1879. If the testimony of the witness, Marcos C. de Baca, to the effect that Prudencio had told him in 1873 that Antonio Baca was the son of Luis Maria Baca, was false, this affidavit of Prudencio was the strongest existing evidence to contradict him. On the other hand, if the testimony of Marcos was true, then this affidavit of Prudencio would have corroborated him.

Plaintiffs, having this evidence in their possession and control, at the trial, and having refused to introduce the same, the presumption of law is that it did corroborate the testimony of Marcos.

> "The failure to produce evidence within a party's control raises the presumption, that, if produced, it would operate against him; and every intendment will be in favor of the opposite party."
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> Kirby v. Tallmadge, 160 U. S., 379, 40 L. ed. 463;
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> Clifton v. U. S., 4 Howard, 24; 11 L. ed. 957;
>
> Bartlett v. Kane, Fed. Cases, No. 1077;
>
> The Busy, Fed. Cases No. 2332.
>
> Quantity of Distilled Spirits, Fed. Cas. 11494.
>
> "Where it was within the power of a party to produce evidence on controverted issues the failure to

produce it warrants a presumption against such party on those issues."

The M. E. Luckenbach, 174 Fed. 265; affirmed 178 Fed. 1004 C. C. A.

"Where a party has the means of producing testimony within his knowledge and keeping upon a material question involved in a case, and fails to do so, the presumption arises that the fact is against him."

Choctaw M. R. Co. v. Newton, 140 Fed. (C. C. A. 8th C. p. 226.) Quotation from page 238.

"Where a party suppresses evidence in his control, the presumption arises that its production would be against his interest."

Westervelt v. Nat. Mfg. Co., 69 N. E. 169, 33 Ind. App. 18.

"The suppression of important evidence is always a fact to be weighed against the party suppressing it."

Sunes v. Rockwell, 156 Mass. 372, 31 N. E. 484.

As the testimony of Marcos C. de Baca, in regard to the statements made by Prudencio in 1873, and by Manuel in 1875, were, to say the least, **prima facie** proof that Antonio Baca was the son of Luis Maria Baca; that he left a son, Juan Manuel, who dying left two children; it was the duty of plaintiffs to have refuted this evidence

by the highest and best evidence in their possession and control, to-wit: The certified copy of the ancient document made by Prudencio Baca in 1879. They had this evidence with them in court; they had it with them throughout the entire trial of the case. They refused to introduce it. The presumption of law is, therefore, that if produced, it would have corroborated the testimony of the witness, Marcos C. de Baca.

Therefore, we say, the testimony of Marcos is corroborated by the ancient document, signed and sworn to by Prudencio Baca in 1879, more than thirty years ago, which plaintiffs had in their possession at the trial, and failed and refused to introduce in evidence. Such is the presumption of law from the acts of plaintiffs themselves.

Having this paper in their possession; knowing as plaintiffs did know, that it corrroborates the testimony of Marcos, as to what Prudencio, and the other sons of Baca, told him in regard to Antonio and his descendants; we do not think it lies with counsel to cast aspersions, and doubts, and insinuendos at the testimony of Marcos C. de Baca, as they have done in their brief in this case.

Prior to the decree herein rendered, the lower court reopened the case for the purpose of permitting Joseph E. Wise to file a certified copy of the will of Luis Maria Baca, as the copy introduced at the trial, although sworn to by the witness Marcos C. de Baca, as being a true copy, was not a certified copy; and the court also opened the case to give plaintiffs, defendants Bouldin and Santa

Cruz Development Company, an opportunity to introduce any testimony on that subject—and the legitimacy of the son Antonio, (Tr. 439-440). Thereafter, and before the rendition of the decree, defendant Joseph E. Wise produced, offered in evidence and filed a certified copy of the will; counsel for all parties being present in court, objected thereto. (Tr. 441-442). At the same time, counsel for Joseph E. Wise offered in evidence a duly authenticated copy of said affidavit of Prudencio Baca, and a duly authenticated copy of the judgment rendered by the District Court of the Territory of New Mexico, in the case of Perea vs. Sulzbacher, the case referred to during the trial as the partition suit brought in 1875; in which judgment that court found and decreed that Antonio Baca, or Jose Antonio Baca, as he somtimes is called, **was a son of Luis Maria Baca.** Objection was made to the filing thereof on the ground that the court had opened the case only for the purpose of permitting Wise to file a certified copy of one paper, and no other purpose. The objection was sustained and Wise excepted. This ruling of the court is assigned as error. Defendants Wise Assignment of Error XVII, Tr. 568.

We call attention at this place to these rulings, because, if, for any reason, this Honorable court is not satisfied with the evidence introduced to prove that Antonio Baca was a son of Luis Maria Baca, it is manifest that there is other evidence of most positive and conclusive character, which can be introduced should the case be remanded for another trial, the introduction of

which evidence, we think, should have been permitted by the lower court, under the circumstances of this case.

The lower court, however, was satisfied, from the evidence that was introduced, that Antonio Baca was a son, who left descendants, as before set forth; and being so satisfied, found in favor of defendants Wise, as to the 1-19 interest inherited by the heirs of Antonio. And this portion of the decree, we submit, should be affirmed.

The evidence of Marcos C. de Baca was admissible.

Opposing counsel urge in their briefs that the testimony of Marcos C. de Baca was inadmissible for the reason that Wise claims some title under the deeds which the heirs of Baca executed to John S. Watts, and for that reason is estopped from claiming a title from a different source.

They admit that this contention does not apply to Margaret W. Wise, who claims nothing from any heir of Baca except Antonio.

In support of their contention they cite authorities to the effect that where two persons claim under a common grantor, **and no other source,** neither can attack the title of that common grantor, or deny that he has a valid title at the time of the conveyance. But Joseph E. Wise does claim title from another source; he claims under the heirs of Antonio, under whom none of the opposing parties claim any title. In the next place, Joseph E. Wise does not attack the title of any heir of Luis Maria Baca. He admits that they all had title under the will

of Luis Maria Baca. He is only endeavoring to prove who the heirs of Luis Maria Baca are; and this proof does not in any way affect the title of any heir.

Again, the deed from the heirs of Baca to Watts of 1864, Plaintiffs' Exhibit C, only purports to convey the right, title and interest which each of the grantors has, whatever that may be. The words of conveyance in the deed are: "do bargain, sell and convey to said John S. Watts * * * **all our right,** title and interest and demand in the following lands, located upon by us as heirs of Luis Maria Baca," etc. (Tr. p. 157). We admit, and in no way attempt to deny, that each maker of that deed did convey whatever interest he then had in the lands in question, as stated in the deed; but upon what theory that deed precludes Watts, or anyone holding under Watts, from obtaining additional title from other heirs, we cannot conceive.

There are five covenants in this deed, in none of which is it recited that the signers are the only heirs, or are all the heirs of Baca, or anything to that effect.

Again, we have shown in our other brief that this deed is not executed by four of the heirs or grantees of heirs, of Baca; and we do not know of any principal of law which would prevent either Watts or a grantee of Watts, from obtaining any of the interest of any of these other heirs. In the case of Elder v. McClaskey, 70 Fed. 529-561, 17 C. C. A. 251, on p. 547 of the decision in the Fed. Rep, says:

"It is well settled that a vendee is not estopped to deny the title of his vendor."

Citing Robertson v. Pickrell, 109 U. S. 608;

Watkins v. Holman, 16 Pet. 25;

Willison v. Watkins, 3 Pet. 43;

Blight's Lessee v. Rochester, 7 Wheat, 535.

In the case of Bybee, v. Oregon & Cal. R. Co., 139 U. S., 663-684; 35 L. ed. 305, the court said:

"It is conceded that, as a general principle, the grantee in a deed of conveyance is not estopped to deny the title of his grantor, and, unless this case be an exception to this rule, it will necessitate an affirmance of this judgment * * * In Merryman v. Bourne, 76 U. S. 9 Wall 592, (19: 683), it was stated that the vendee 'holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party;' and in Robertson v. Pickrell, 109 U. S. 608, (27: 1049) it was held, in an elaborate opinion by Mr. Justice Field, that defendants, who held under a deed of a life estate, were not estopped from setting up a superior title. Cases in the state courts to the same effect are Comstock v. Smith, 13 Pick. 116; Osterhout v. Shoemaker, 3 Hill, 518; Clee v. Seaman, 21 Mich. 287, and Sparrow v. Kingman, 1 N. Y. 242."

In the case of Robinson v. Thornton, 102 Cal. 675;

34 Pac. 120, this question is elaborately considered, and the court holds that a grantee does not assume any obligation towards his grantor, and that he is not estopped from showing in any controversy, another and independent title in himself. The court said:

> "There is no estoppel when the occupant is under no obligation, express or implied, that he will at some time or in some event, surrender the possession. The grantee in fee is under no such obligation * * * he owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.

Opposing counsel further claim that Marcos C. de Baca was estopped by covenants in the deeds of 1864 and 1871, made by his ancestors, from acquiring the title from the heirs of Antonio Baca. We have considered the deed of 1864. The deed of 1871 (Plaintiffs' Exhibit O, Tr. p. 197,) so far as it is a conveyance of Baca Location No. 3, or of any other lands mentioned in the deed of 1864, is nothing but mere quitclaim. In that deed the grantors first grant and convey the location known as number 5, a tract of land in the northern part of Arizona, more than two hundred miles distant from the tract in dispute in this action. The makers of that deed do make most binding covenants as to their ownership and title to that location number 5; and then they say that they relinquish and quitclaim to Watts all their right, title and interest

in all the lands in the deed of May 1, 1864, mentioned and described. (Tr. p. 202).

Opposing counsel assert in their brief, that the covenants of the ancestor of Marcos C. de Baca, in a deed conveying to John S. Watts location No. 5 estop said Marcos C. de Baca from acquiring title to location 3. They cite no authority for such a doctrine; and of course none can be found.

Declarations of a grantor made after his grant in disparagement of his title, are not admissible against his grantee or other persons claiming through or under him to impeach the deed.

The soundness of the foregoing statement, as an abstract principle of law, is not disputed; but it has no application whatsoever to this case.

Admissions against interest are always admissible as against the one who makes them. Admissions against interest, made by a grantor, while holding the title, are not only admissible against him, but also against his grantee. 1 Ency. of Ev. 510.

But if the grantor made the admission in derogation of his title, **after** he parted with his interest, such declarations are not admissible against his grantee. Nor are they admissible against his grantee if made **before** the grantor himself acquired title.

> "Declarations by a former owner of property, made **before** he acquired it, or **after** he parted with

it, do not bind his successor in interest.

Hutchins v. Hutchins, 98 N. Y. 56.

Such being the law, opposing counsel argue that the statements made by Prudencio Baca, Manuel Baca and other sons of Luis Maria Baca, as to Antonio Baca being a son of Luis Maria Baca, and their brother, are inadmissible in evidence, because such evidence is an admission against interest made by a grantor after he parted with his title, and tends to disparage the title he conveyed.

But statements or declarations as to pedigree cannot be classed as admissions. Such statements are not admissible as admissions against interest, but on an entirely different ground and for an entirely different reason.

It is the general rule that all hearsay evidence is inadmissible. To this rule are many exceptions: (1) Dying declarations, (2) Declarations in the nature of **res gestae;** (3) Declarations against interest, (4) Declarations concerning matters of pedigree; and so on. 6 Ency. of Ev. 447.

The learned counsel admits such declarations were admissible as hearsay evidence of pedigree; but they argue, that as the declarations were not admissible as declarations against interest, binding on a grantee, they were not admissible at all.

They might as well say that as the declarations were not admissible as dying declarations, they were not admissible at all.

We did not offer the evidence as a dying declaration nor as a declaration against interest binding on anybody, but as a declaration in a matter of pedigree. If admissible for that purpose, it was the duty of the court to admit it. It is absurd for counsel to argue that evidence offered for one purpose for which it is admissible, must be excluded by the court because it is not admissible for any other purpose. And that is their argument.

Again, the testimony did not in any way disparage the title which Prudencio and the others conveyed to Watts by the deed of 1864. We have shown that in that deed, and the deed so recites, they only grant and convey "all their right, title and interest." Tr. p. 157. An inquiry as to the quantity of interest each heir had, when he so conveyed, is no disparagement of the title; for each only purported, in that deed, to convey whatever interest he had. Evidence as to who the heirs were does not disparage the title in the least.

The deed of 1871, as we have shown, was only a quitclaim as to Location No. 3, and therefore only purported to convey whatever interest each had, if he had any. Evidence as to who the heirs of Baca were was no disparagement of that title.

We submit there is no merit whatsoever in this contention of counsel.

The question is one of heirship rather than pedigree.

The executor of the will of Baca, in his petition to

the governor in 1827, stated that he had rejected the claim of Francisca Garviso, widow of the deceased son, to participate in the estate, for the reason that charges against his son wiped out his patrimony; and he asked the governor to make a decree in the matter. Tr. p. 448-449.

The governor did then order the Alcalde of Cochite to hear both parties "with regard to the claim of Francisca Garviso and pass judgment adjusted to justice, with the understanding that if something was given in life to her deceased husband it will be deducted of that which at last and by the death of his father he should be entitled to." Tr. 452.

The record in this case does not show that the matter was ever presented to the Alcalde; or that any decision of the controversy was ever made.

Opposing counsel argue that the petition of the executor, should be given the same force and effect, as a judgment. That we must assume and presume, that the Alcalde **did** hear the matter, and that the Alcalde did decide that Antonio's debts to the estate exceeded his distributive part of his father's estate.

But there is no presumption, because a claim is made, that it is just. There is no presumption, because a complaint is filed in a case, that a judgment was rendered thereon; or that a judgment was rendered in favor of the claimant.

The order of the governor was that the Alcade should

hear the matter; that whatever was given to Antonio in his life time should be deducted from his part of the inheritance. Giving this order of the government the force of a judgment, it decides nothing except that the matter should be heard by a certain Alcalde. And the matter was never heard, so far as the record here shows.

The will of Luis Maria Baca directed that "the balance of lands known as mine be divided between all my heirs in equal parts." This will the governor approved. Under this will the heirs of Antonio inherited the share of the lands coming to their father.

No judgment or order of any court or officer, or tribunal, has annulled this provision of the will; or decided that the debts due the estate by Antonio were equal to or greater than his patrimony. This will is conclusive that Antonio, or his heirs, he being dead, were heirs of Luis Maria Baca.

Thirty three years after the executor filed his petition, and the governor ordered the matter to be heard, Congress passed the Act of 1860, granting to the heirs of Luis Maria Baca, the right to select some 500,000 acres of land. The heirs of Baca did, in 1863, select, as part of that land, Location No. 3, the tract of land described in the decree in this case.

If Antonio Baca, or his descendants, were heirs of Luis Maria Baca, this grant by Congress was made to them, as well as to all the other heirs.

The fact that Antonio was indebted to his father, or

his father's estate, in 1827, is utterly immaterial, for Congress did not make the grant to those heirs only who were not indebted to the estate. The grant is to all the heirs of Baca; and if Antonio, or his children, are heirs of Baca, they are included in the designation of those to whom the grant was made. The will of Luis Maria Baca makes all his children his heirs. The will itself decides the question.

We therefore submit that the lower court properly found from the evidence in this case that Antonio Baca was a son of Luis Maria Baca, to whom, with the other were heirs of Luis Maria Baca, to whom, with the other heirs of Baca, Congress made the grant by the Act of 1860. That the defendants Joseph E. Wise and Margaret W. Wise, as the grantees of these heirs of Antonio Baca, are the owners of the 1-19 interest now in controversy; and the decree of the lower court adjudging that interest to them, should be affirmed.

II.

The grant by Congress in the Act of June 21, 1860, is to all the heirs of Luis Maria Baca.

The Act of June 21, 1860, is as follows:

> "Sec. 6. And be it further enacted that it shall be lawful **for the heirs of Luis Marie Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to claim instead of the land claimed by them, an equal quantity of vacant land.** * * *"

17 Stat. at L. 71.

Opposing counsel assert that the words in the foregoing Act, to wit: "the heirs of Luis Maria Baca who make claim to the said tract of land," should be construed to mean: **those** heirs of Luis Maria Baca who made a claim to said tract of land before the Surveyor General of New Mexico, in a petition filed in 1857; and that any heir of Baca who did not join in that petition never made a claim and for that reason is excluded from his or her inheritance.

The petition filed with the Surveyor General in 1857, which counsel assert determined what particular heirs of Baca made claim to the Las Vegas grant, requires inspection to ascertain who made it, and what it says. It is set forth in the Transcript as "Santa Cruz Development Company's Exhibit 4, Tr. p. 403."

This petition is signed "Jno. S. Watts, Atty. for petitioners." It is not signed by any of the heirs themselves. It recites that in 1821, the State of Durango granted the lands to Luis Maria Cabeza de Baca, and **his male children;** that Baca long since died, and the only male children now living are, Luis, Prudencio, Jesus 1st, Jesus 2nd, Domingo and Manuel Baca; that the following sons are dead, to wit: Juan Antonio, Jose, Jose Miguel, Ramon and Mateo, and at the time of their death they left the following children and heirs—here follow the names.

Then comes the following very important statement: "Your petitioners further state that the foregoing con-

"tains all the surviving heirs of the said Luis Cabeza de "Baca, deceased, **known to your petitioners."** Tr. p. 405. That is all of the petition in this record.

According to the petition, the grant was not made to Luis Maria Baca alone, but jointly to him and his male children. As he has thirteen sons, including the son Antonio, the grant was made jointly to fourteen grantees, to wit: Luis Maria Baca and his thirteen sons. Each had an undivided 1-14 interest, as an original grantee, under the grant from the State of Durango, according to this petition.

The petition further states that Luis Maria Baca long since died. Such being a fact, and as the petition does not state he disinherited any of his children, all his children, both male and female, inherited, share and share alike, his 1-14 interest. Each son, however, in addition to his share of the father's estate, was entitled to an 1-14 interest in the whole grant, as an original grantee.

It is conceded, and the evidence shows, that Baca had six daughters, in addition to his thirteen sons. These daughters, if the petition aforesaid determines the question of ownership or claim, would only be entitled to an undivided 1-19 of the 1-14 interest that Luis Maria Baca himself had in the grant.

Each son would be entitled to an undivided 1-19 of the 1-14 interest as an heir, and 1-14 as an original grantee.

So that, if the petition to the Surveyor-General, and

not the Act of Congress, is to determine the amount of interest claimed by each heir of Baca, then Antonio Baca and his heirs would be entitled to 1-14 interest plus 1-19 of 1-14 interest; being a larger proportion than found by the lower court.

This is the result, if the contention of opposing counsel is correct, that the petition filed with the Surveyor-General in 1857, and not the Act of Congress, determines what particular heirs of Baca made claim to the Las Vegas Grant, and the amount of interest each is entitled to.

If opposing counsel are correct, then the lower court erred in decreeing Joseph E. Wise and Margaret W. Wise, as owners of the interest of the heirs of Antonio Baca, to be entitled to only an 1-19 interest, for the amount of Antonio's interest, as a grantee from the Mexican government, was 1-14 interest, and to this must be added the interest his heirs inherited from his father's estate. So if counsel was correct, they have no reason to complain of the decree which adjudges to the Wises only 1-19 interest; when according to their own showing and argument the Wises were the owners of more than 1-14 interest. The error, if any, is to their benefit.

However, as the Act of Congress did not limit the right to select lieu lands, to the male heirs of Baca; or the particular male heirs who are named in the said petition; but did grant the right to all the heirs; this petition is utterly immaterial.

There is no evidence in this case that the Surveyor-General made any report to Congress upon this claim or petition; or that he found or decided who the heirs of Baca were; or whether or not the Las Vegas grant was made directly to the sons, as well as the father. The report of the Surveyor-General is not in evidence. As the report, whatever it said or recommended, was not confirmed by Congress, it was utterly immaterial in this case. But even if it were material, it is not in evidence; it never was offered in evidence by anyone on the trial, and cannot be found in the record.

And opposing counsel are asking this court to decide that this report determines what heirs of Baca were owners of the Las Vegas grant, when the report is not in evidence in the case. Opposing counsel, in their brief, have seen fit to refer to this report as being filed with Congress, although there is no evidence in the record to that effect. But we also note they have taken great care not to state what the report was, or whether or not the Surveyor General made any recommendaion therein; or whether he found or determined who the heirs of Baca were.

The report of the Surveyor General is, however, contained in the decision of the Supreme Court of the United States, in Maese v. Herman, 183 U. S. 572-582; 46 L. ed. 335, in which case the said Act of 1860 is considered.

In this decision, as set forth on p. 578 thereof, the Surveyor General is quoted as saying therein:

"Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant and that they went upon the land knowing the exisence of a prior grant * * It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain * * * and that, in the absence of the one, the other would be a good and valid grant; but as this office has no power to decide between the conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress, through the proper channel for its action in the premises."

183 U. S. 578.

There is nothing in this report showing that the Surveyor General passed upon, or determined, or reported upon, what particular heirs of Baca made claim or were entitled to the Las Vegas grant; or that any of them had a valid claim, as against the claim of the inhabitants of the town of Las Vegas.

Upon the report, quoted in the above decision, the claim of Maese and others representing the town of Las Vegas, was confirmed by the Act of June 21, 1860; and by the same Act, being Section 6 thereof, heretofore quoted, Congress gave "to the heirs of Baca who make claim to the said tract of land as is claimed by the town of Las Vegas, the right to select other lands in lieu thereof.

"The heirs of Baca who make claim," etc., in the Act of 1860, read in view of the report of the Surveyor General, aforesaid, shows that it was the intention of Congress to grant to all the heirs of Baca, whoever they might be, the right to select other lands in lieu of the lands confirmed to the town of Las Vegas; and that Congress could not have had in mind any particular heirs of Baca, for the reason, that the report of the Surveyor General made no mention of any particular heirs, and made no finding upon that subject.

It is also clear, that if Congress intended that the grant should only be to those male heirs of Baca who, by John S. Watts, their attorney, filed the petition with the Surveyor General in 1857, namely, the surviving sons of Luis Maria Baca, it undoubtedly would have made the grant to the surviving sons of Luis Maria Baca, and not to the heirs of Luis Maria Baca generally.

The report of the Senate Committee on Private Land Claims, on May 19, 1860, refered to in the brief of opposing counsel, states (we quote from counsel's brief, as this report is not before us, and is not in evidence in the case), "that the heirs of Baca had expressed a willingness to waive their older title in favor of the settlers, under the grant to the town of Las Vegas," etc.

If only the surviving sons of Baca were willing to make this waiver, the Senate Committee undoubtedly would have said so; but they say that **all** the heirs of Baca are willing to make the waiver in favor of the town of Las Vegas; and it is because **all** of the heirs were will-

ing to waive their claims, that the Committee recommend the passage of the Act which gave to **all** the heirs of Baca, the right to make selection of other lands.

Again, in the decision of the U. S. Supreme Court, Maese v. Herman, supra, on page 579, the court goes on to say that after the approval of the Act of June 21, 1860, notice of the confirmation was sent by the Land Office to the Surveyor General of New Mexico, advising him that, "This law gives the land to the Vegas town claim, **and allows the Baca heirs** to take an equal quantity of vacant land, not mineral, in New Mexico," etc. Id. p. 579.

It was the duty of the Surveyor General to pass upon the selection made by the Baca heirs. He was instructed by the Land Office that the Act gave the right to make this selection, not merely to those of the heirs who filed the petition, but to **all** the heirs of Baca. If only the surviving sons of Baca were the ones to whom Congress made the grant, then they were the ones who could make the selection. But the Land Office took no such view of the Act of 1860. The Surveyor General is specifically instructed that this Act of 1860, "allows the heirs of Baca to take an equal quantity of vacant land," etc. This means, all the heirs of Baca, and no specific ones of them. And this construction of the Act of Congress made at the time, by the General Land Office, to whom the Surveyor General made his report, is, we think, conclusive to show that the grant was made to all the heirs of Baca, whomsoever those heirs may be.

Again, the U. S. Supreme Court itself, in the case of Maese v. Herman, after giving full consideration to the report of the Surveyor-General and the Act of Congress, says, in regard to this report on page 581 of the decision:

> "The surveyor general, however, did not assume to decide the dispute between the parties, but referred it to 'the proper tribunals of the country' and to Congress. Congress accommodated the dispute by a magnificent donation of lands **to the heirs of Baca,** and confirmed the original land to the town."

The Supreme Court of the United States itself construes the Act as being a donation to the heirs of Baca, and **not** to those particular heirs of Baca, to wit, his surviving sons, who by John S. Watts as their attorney, filed the petition with the Surveyor General of New Mexico in 1857.

Prior to that decision, the Supreme Court of the United States was called upon to pass upon certain questions involving Location No. 4 made under this Act of 1860. We refer to Shaw v. Kellogg, 170 U. S. 312-343; 42 L. ed. 1050. Mr. Justice Brewer, for the court, reviewed the Act of June 21, 1860, and the records of the Land Office, and amongst other things, says: (P. 315 of decision).

> "The survey made of the grant to the town of Las Vegas showed an acreage of 496,446.96 acres; a certificate of which fact was given **to the heirs of said Baca."**

The statement of facts in that decision further shows that on December 12, 1862, John S. Watts, attorney for the heirs of Luis Maria Baca, made a selection for Location 4. He signed his name "John S. Watts, attorney for the heirs of Luis Maria Baca," (p. 315 of decision).

That on December 5, 1863, John Pierce, Surveyor General of New Mexico, approved the selection as follows:

> "This is to certify that from good and satisfactory evidence, I am perfectly satisfied that the land on **which the heirs of Luis Maria Baca** have located their grant No. 4 * * * is non-mineral and is vacant."

And the Register and Receiver of the Land Office made similar certificate, saying that "we are perfectly satisfied that the land on which **the heirs of Luis Maria Baca** have located their grant No. 4 * * * is not mineral and is vacant." (p. 319 of decision). And so all the way through the location, the survey thereof, the approval, all refer to the lands selected by the "heirs of Luis Maria Baca."

In rendering the decision in that case, Mr. Justice Brewer, amongst other things, said:

> "The grant was made in lieu of certain specific lands **claimed by the Baca heirs,** in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the

limits of New Mexico. **The grantees, the Baca heirs, were authorized to select this body of land.**

Quoting p. 332 of decision.

We call attention to the last line of the foregoing quotation, which we have underscored. Here is the expression of the United States Supreme Court, that the grantees under the Act of Congress of 1860 were the Baca heirs; that **they** were authorized to make the selection of the lands. There is no intimation that only those heirs of Baca who were his surviving sons, and had joined in the petition filed with the Surveyor General, in 1857, were the grantees to make the selection, as claimed by opposing counsel.

Not only did the Land Department, the Surveyor General and the U. S. Supreme Court, construe the Act of 1860 as being a grant to all the heirs of Baca, and not to any particular ones of them; but Congress itself, by a later enactment, so construed this Act of 1860. We refer to an act entitled "An Act to Confirm Certain Private Land Claims in the Territory of New Mexico," approved June 11, 1864. 13 Stat. at L. 125 being an Act to amend the Act of June 21, 1860. It is as follows:

> "Be it enacted, &c., that the 6th section of the Act entitled "An Act to confirm cerain Privae Land Claims in the Territory of New Mexico," approved June 21, 1860, be and the same is hereby so amended as **to enable the heirs of Luis Maria Baca** to raise and withdraw the selection and location of

one of the square bodies of land confirmed to them by said Act, heretofore located by said heirs, on the Pecos river * * * and upon such selection and relocation, the title to said square body of land, the same being the one-fifth part of the private claim confirmed to said heirs, as aforesaid, so selected and relocated, shall be and is hereby confirmed to **the said heirs of the said Luis Maria Baca** * * *."

This amendment does not affect Location No. 3; but it does affect one of the other locations, and it shows that Congress, by the Act of 1860, granted the right to all the heirs of Luis Maria Baca to make the selection of land as therein set forth; and that this right was not confined to any particular ones of those heirs.

Not only did Congress so construe the Act; but John S. Watts, the attorney for the heirs of Baca; and the heirs of Baca themselves, also construed it as giving the right to all the heirs of Baca, and not merely to the surviving sons whose names appear in the petition filed with the Surveyor General. Thus, in the selection made of Location 3, on June 17, 1863, by John S. Watts, he says: "I, John S. Watts, the attorney of the heirs of Don Luis Cabeza de Baca, have this day selected as one of the five locations **confirmed to said heirs** under the sixth section of the Act of Congress approved June 21, 1860, the following tract * * *," and he signs himself, "John S. Watts, attorney for the heirs of Luis Maria Cabeza de Baca. Plaintiffs Exhibit K-1, Tr. p. 174.

This selection is made by the attorney of all the heirs of Baca, and he says that he makes it **for all of said heirs.** He does not pretend to act only for the surviving sons, whose names are mentioned in the petition which he himself had filed with the Surveyor General in 1857, as contended by counsel.

Again, in the application of John S. Watts of April 30, 1866, to amend the description of the location so made by him in 1863, he says: "You will find by reference to the papers on file in your office, that on the 17th of June, 1863, I filed with the Surveyor General of New Mexico, an application for the location of one of the five locations confirmed **to the heirs of Luis Maria Cabeza de Baca,** under the 6th section of the Act of Congress approved June 21, 1860 * * *" Plaintiffs' Exhibit K-7, Tr. p. 176. And he signs this also, "attorney for heirs of Luis Maria Cabeza de Baca."

Now, prior to Watts' making this application a number of the heirs of Baca had executed to him a deed, conveying to him all their right, title and interest in Location No. 3 of the Baca series, being the deed dated May 1, 1864, Plaintiff's Exhibit C, Tr. p. 154. Watts himself was the owner of a very large interest in Location No. 3, when he made the application to amend in 1866; and as such owner, he declares that the Act of Congress of 1860 confirmed to the heirs of Baca the right to make the location. He does not pretend that the right was only given to those male heirs who survived their father.

And the deed to Watts of May 1, 1864, supra, recites,

amongst the other heirs of Baca, the six daughters whose names we have heretofore mentioned; further showing that he considered that the grant by the Act of Congress was to all the heirs of Baca, both female children, as well as male.

For fifty years, the courts, the Land Office, Congress, the heirs of Baca, and John S. Watts himself, have construed and conceded, that the grant by Congress was to all the heirs of Luis Maria Baca; and now, in this case, and for the first time, the contention is made, that the grant was only to those surviving male heirs who made claim to the Las Vegas grant in the petition which, in 1857, was filed with the Surveyor General.

We submit that the construction given to the Act of 1860, by the Supreme Court, by Congress itself, by the Land Department, by the heirs of Baca, and by John S. Watts, is conclusive that the words in that Act, to wit: "It shall be lawful for the heirs of Luis Maria Baca who make claim to the said tract of land as is claimed by the town of Las Vegas," meant all the lawful heirs of Luis Maria Baca; and did not mean those heirs who, although they might make such a claim, nevertheless, were excluded, unless they were those particular heirs, who as, the surviving sons, asserted a claim in the petition filed with the Surveyor General in 1857, as contended by opposing counsel.

The argument of opposing counsel is based upon the decision of Connoyer v. Schaeffer, 22 Wall, 254-263. In that case the court did not construe the Act of June

21, 1860, but the Act of Congress of July 4, 1836. The question in that case arose in regard to a grant within the limits of the Louisana purchase, which had been passed upon by a board of commissioners, created by Acts of Congress of 1805 and 1807. The power and duties of the board of commissioners created by those Acts, were different from the powers and duties of the Surveyor General of New Mexico under the Act of 1854; and a reading of that decision throws no light upon the present controversy. We will quote the syllabus of the case, for it crystallizes the points decided:

> "1. A Spanish claim to land, if confirmed by the commissioners, has the effect of a confirmation to the legal representative of the person to whom the original concession was made, where the commissioners passed upon nothing but the merits of the original concession.
>
> 2. But where the claimant presented before the Board, besides the original title, evidence of a derivative title, **and the commissioners decided upon both,** the confirmation operates as a grant to the claimant, although his name was omitted in the form of confirmation."
>
> Connoyer v. Schaeffer, 22 Wall. 254-263.

In that case, and in many other cases, it has been held, that where the report of the Commissioner, or, as in other cases, of the Surveyor General, contains a specific recommendation, that a certain Mexican or Spanish

grant be confirmed to a certain individual, the Act of Congress confirming such report vests the individual with title. Of course this is so. For the action of Congress in such a case, is the same as though it had named the individual in the Act itself. And we admit, if Congress, in the Act of 1860, had limited the right to make selection of lands to those sons of Baca for whom Watts had filed the petition in 1857, then those sons undoubtedly would have been the grantees under the Act of Congress. But Congress did not so express itself; it made the grant to the heirs of Luis Maria Baca, and left it to the courts to determine who those heirs were.

Opposing counsel, in their brief, have referred to a number of reports of the Surveyor General of New Mexico, on other claims to Mexican grants, which were reported to Congress and confirmed by the Act of 1860. None of these reports are in evidence in this case, and none of them are material. We have some doubt, however, as to the propriety of counsel referring to reports of the Surveyor General not in evidence, and not in the record. But if such is the proper practice, then it does seem to us, that the great industry of counsel would have enabled them to have discovered the specific report of the Surveyor General upon the rival claims made by the town of Las Vegas and the heirs of Baca, to the Las Vegas grant, which **is** material in this case. It would appear, that the only report of the Surveyor General of any importance, in the present case, was the particular report which the industry and assiduity of counsel permitted them **not** to find.

Opposing counsel say, that under the Act of Congress of 1854, the Surveyor General of New Mexico had "the authority to report, not only on the validity of the original grant, but to decide who was the claimant to whom the grant was to be confirmed by Congress, and to whom a patent was to be issued."

The Supreme Court of the United States, however. in construing the powers of the Surveyor General under this Act of 1854, denies any such authority to the Surveyor General.

In the case of Pinkerton v. Ledoux, 129 U. S. 346-355; 38 L. ed. 708, the court said on this specific point:

> "The Surveyor-General's report is no evidence of title or right to possession. His duties were prescribed by the Act of July 22, 1854, before referred to, and consisted merely in making inquiries and reporting to Congress for its action. If Congress confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress, it had no effect to establish such boundaries, or anything else subservient to the title."

If the Surveyor General did report to Congress, recommending the confirmation of a particular grant to a particular individual, and if Congress did confirm that grant as reported, of course, such Act of Congress would vest a title in the person named.

But in regard to the Las Vegas Grant, the Surveyor General, in the first place, did not recommend the confirmation of that grant to any claimant, for the reason that the town of Las Vegas claimed it on the one hand, and the heirs of Baca, or some of them, claimed it on the other hand. He made no recommendation, except that he found that a valid grant had been made to someone, and he left it to Congress to determine to whom that particular grant should be confirmed; and Congress solved that problem by confirming that particular grant to the town of Las Vegas; and then Congress gave to all the heirs of Luis Maria Baca the right to select other lands, because, as stated in the report of the Senate committee, referred to by counsel in their brief, the heirs of Baca were willing that that should be done.

We therefore submit, that the Grant of 1860, to make selection of five tracts of land, was given to all the heirs of Luis Maria Baca; and it is for this Honorable Court, on this present appeal, itself to determine, whether the descendants of the deceased son Antonio Baca were such heirs.

If, therefore, Antonio Baca, or his heirs, he having died before his father, were heirs of Luis Maria Baca, then, as such heirs, they were amongst the grantees under the grant made by the Act of Congress.

The lower court found and decreed that Antonio Baca was a son of Luis Maria Baca, who dying left a son, who dying left a son and daughter; and the children of this son and daughter have conveyed their interest in-

herited from Luis Maria Baca, to Joseph E. Wise and Margaret W. Wise, the present owners in fee thereof. The evidence, as we have shown, support the findings and decree.

We submit this decree, as to this 1-19 interest, should be affirmed.

Respectfully submitted,

SELIM M. FRANKLIN,
Attorney for Joseph E. and Margaret W. Wise.

JAMES R. DUNSEATH,
Of Counsel for Margaret W. Wise.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

Joseph E. Wise, et al.,
Appellants,

vs.

Cornelius C. Watts, the Bouldins, et al.,
Appellees.

No. 2719.

Supplemental Brief of Appellants Wise, as to the Validity of the Sheriff's Sale Under Which the Interest of D. W. Bouldin Was Sold.

SELIM M. FRANKLIN,
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Supplemental Brief of Appellants Wise, as to the Validity of the Sheriff's Sale Under Which the Interest of D. W. Bouldin Was Sold.

Defendants Bouldin in their brief assert that in a suit against an administrator the waiver of recourse against other property of the estate is jurisdictional, and that without such waiver the court has no power to order the sale of attached property.

When claim is rejected by the administrator the statute provides that suit can be brought.

Sec. 1115 of the Revised Statutes of Arizona of 1887, specifically provides that when a claim is rejected the holder may bring suit thereon. The section is as follows:

> "Sec. 1115. When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after date of its rejection, if it be then due, or within two months after it becomes due. Otherwise the claim is forever barred."

Sec. 1117 provides, that no holder of any claim against an estate shall maintain any action thereon until it is first presented; except that a mortgage or lien may be enforced if recourse against other property of the estate is expressly waived in the complaint. The section is as follows:

> "Sec. 1117. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented."

The courts of California have held, under statutes

identical with the statutes just quoted, after presenting his claim the lienholder can bring suit to foreclose the same without waiving recourse against any other property of the estate. Moran v. Gardemeyer, 82 Cal. 96; 23 Pac. 6. In that case the court said:

> "Counsel contend that, having filed his claim under section 1497, Code Civil Pro., a mortgagee is under the present constitution and statutes, thereafter barred of the right to proceed by foreclosure, unless the right is given by Sec. 1500, and that under that section it is only given where he declines to file his claim under section 1497, and elects to look to the mortgaged property alone, for the recovery of his money ,and expressly waives all claim against the estate for deficiency and all claim for counsel fees; also claiming that when his claim is once filed and allowed he is amply protected by the provisions of Sec. 1569. We cannot concede, as counsel contend, that this is now an open question in this court. The point made was directly decided against the position taken by appellants here, in Society v. Conlin, 67 Cal. 180, 7 Pac. 477. This case was followed by Society v. Hutchinson, 68 Cal. 52, 8 Pac. 627, and Wise v. Williams, 72 Cal. 544, 14 P. 204."

Moran v. Gardemeyer, 82 Cal. 96; 23 Pac. 6.

Again, Sec. 1119 Revised Statutes of Arizona of 1887 provides:

"Sec. 1119. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required."

This section is identical with Sec. 1502 of Code Civil Procedure of California. And the California courts have held that proof of the simple presentation of plaintiff's claim is all that is required to enable him to have the action revived against the executor.

"Under Code Civ. Pro., 1502, providing that upon the death of a defendant, plaintiff must present his claim to the executor or administrator for allowance, and no recovery shall be had in the action unless proof be made of the presentation required, proof of the simple presentation of plaintiff's claim is all that is required to enable him to have the action revived against the executor."

Gregory v. Clargorough, 62 Pac. 72, 129 Cal. 475;

Falkner v. Hendy, 107 Cal. 49; 40 Pac. 21, 386;

Society v. Wackenrender, 99 Cal. 507, 34 P. 219;

Frazier v. Murphy, 133 Cal. 91, 65 Pac. 326;

Vol. 1 Church Pro., p. 764; also Par. 466, p. 683,

Vol. I Church.

The judgment of the district court of Arizona, in the case of Ireland and King v. Bouldin and Goldschmidt, administrator, specifically recites that the plaintiffs had presented their claim to the administrator and that it had been rejected. Tr. p. 468.

As the claim of Ireland and King had been presented to the administrator; as it had been rejected, and as that fact appears in the judgment itself, the case was revived against the administrator, and the court had jurisdiction to render the judgment which it did.

In the case of Wartman v. Pecka, 68 Pac. 534; 8 Ariz. 11-15, on page 11, the Arizona court specifically held that the court does have jurisdiction to foreclose attached property, and that the action shall not abate by death.

> "The attachment proceeding becomes, therefore, an integral part of the action; and the provisions of paragraph 725 providing that an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, apply, and embrace the foreclosure of the lien, as well as the cause of action."

Now only is the allegation of waiver against recourse against other property of the estate not required, when the claim has been presented to the administrator; but

it would be a mistake to insert such an allegation, for the holder of the claim **is** entitled to recourse against other property of the estate, in the event the amount realized from the sale of the mortgaged or attached property is insufficient to pay his debt.

Sheriff's Certificate of Sale

We note that counsel for the Bouldins in their brief, on pp. 62 to 64 thereof, copy the Sheriff's Return of Sale, and cite the same as being found on p. 513 of the record. But on p. 513 of the transcript of record is the Sheriff's Certificate of Sale, Defendants Wise Exhibit 22; and not the Sheriff's Return of Sale, which is part of Wise Exhibit 19, on pp. 472-476 of the transcript.

The Sheriff's Certificate of Sale is different from his Return; in this certificate he recites the execution and what he was commanded to do thereby, and then refers to the execution itself, and then recites:

> "I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to Wilbur H. King, who was the highest and best bidder, for the sum of Two Thousand Dollars ($2,000) lawful money of the United States, which was the whole price bid for the same, the real estate particularly described as follows, to-wit; (Here comes description) and the said real estate was sold in one parcel and that the price for each distinct lot and parcel was as follows: $2000, and that the said real estate is subject to redemption in lawful money of the United

States, pursuant to the statute in such cases made and provided. Given under my hand this 31st day of July, 1898. Robert N. Leatherwood, Sheriff. By W. H. Taylor, Under Sheriff. Tr. pp. 513-515.

This Certificate of Sale shows that a valid sale was made, and the mistake in reference by counsel for Bouldin was an inadvertence, to which it is necessary to call attention.

Now in regard to the return of sale, set forth on pp. 472-479, it will be observed that the published notice of sale was part of the Sheriff's Return. The notice of sale is on pp. 474-476 of the Transcript. Being a part of the return, this notice of sale must be construed in connection therewith. This we have done in our main brief on pp. 207 to 211 thereof, to which we here call attention.

In further support of our statement that under the judgment foreclosing the attachment lien and the order of sale thereon, no levy was necessary to be made by the sheriff, and therefore, and that his recital of levy is mere surplusage, we refer to the case of Wartman v. Pecka, 8 Ariz. 8-15, also cited by counsel for the Bouldins, in which that court said:

> "Under our statute no execution need be levied upon property held under attachment, and directed by the court to be sold in satisfaction of the judgment, for the order of the court is sufficient warrant to the sheriff, or other officer, to sell. In this

respect the proceeding is analagous to the sale of property under judgment foreclosing a mechanics' lien."

The statement of counsel for Bouldin, in their brief, "that the certificate of sale is the only evidence which we have of what was actually sold, and it shows that the sheriff sold the interest of Leo Goldschmidt, administrator of the estate of David W. Bouldin, and not the interest which he had been ordered to sell, namely, the interest attached on March 14, 1893," is not supported by the certificate of sale nor by the return of the sheriff; for each shows that the sheriff recites he was ordered to sell the property described in the order of sale; and the order of sale itself is a certified copy of the judgment, which is made a part of the sheriff's return. This property described in the order of sale is what he sold. This order of sale is to be found on pp. 472 to 479 of the Transcript.

The Sheriff's Deed

The first deed executed by the sheriff was on January 16, 1899, by Lyman W. Wakefield, Sheriff, Tr. 515-520. This deed was defective, and thereafter, and on the 30th day of September, 1914, the court ordered John Nelson, the then sheriff of Pima County, to execute a new deed. Tr. 489. Nelson executed the curative deed. Tr. p. 520.

The validity of the sale did not depend upon the execution of a deed by the sheriff.

In the case of Donnebaum v. Tinsley, 54 Tex. 363-366, the court said:

> "But the title of a purchaser of land at sheriff's sale does not depend upon the deed. It rests upon a valid judgment, levy and execution sale and the payment of the money. The sheriff's deed is not essential."

> "A sheriff's deed defective to pass title, is nevertheless admissible in evidence as conducing to show that the purchaser at the sale had acquired the equitable title to the land."

> Miller v. Alexander, 8 Tex. 36-46.

> "A purchaser of real property at a judicial sale or execution sale, takes all the rights of the parties whose interests are sold and hence may sue to quiet title."

> Copper Belle Mining Co. v. Gleason, 134 Pac. 285, 14 Ariz. 548.

In the case of Oliver v. Dougherty, 8 Ariz. 65; 68 Pac. 553, the Supreme Court of Arizona held that the purchaser of property at a forecloseure sale, receiving a sheriff's certificate but no deed, has such an interest in the property that it can be sold on execution, and that the purchaser, as assignee, can maintain an action thereon to quiet title. The above case is cited with approval in Van Vranken vs. Granite County, 90 Pac. (Mont.) 164, wherein the court says:

"We are of the opinion that possession under an equitable title is sufficient to support the astion" (to quiet title).

"The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser, or those claiming under him, at any time in a proper proceeding for that purpose. Until the sale had been set aside, a certificate of purchase would be as fully protected as though the legal title had been conveyed by deed made in pursuance of the statute."

Diamon v. Turner, 11 Wash. 189, 39 Pac. 379.

The Sheriff can execute a deed at any time after redemption.

The Revised Statutes of Arizona of 1913, in regard to the sheriff executing a deed on execution sale, provides as follows:

"At the expiration of the period of six months, if no notice of intention to redeem be given by any lien holder or creditor . . . . . and not sooner, the sheriff shall execute and deliver a deed to the property sold to the purchaser at the sale, or in case redemption is made by a redemptioner, then to the last redemptioner redeeming said property."

R. S. A .of 1913, §1380.

Same as R. S. A., 1901, §2579.

This is substantially the same as the provision in Section 22 of Act No. 20, approved March 18, 1899, which Act repealed Chapter I, Title 26 of the Revised Statutes of Arizona of 1887, entitled Executions. The provision of the Act of 1889 on the subject of sheriff's deed is as follows:

> "If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance."
>
> Acts of the Legislative Session of Arizona, 1899, Act. No. 20, Sec. 22, p. 44.

The present statute of Arizona further provides that the successor in office of the sheriff who made the sale, can execute the deed, if the purchaser become entitled thereto after the expiration of the term of the officer making the sale. The statute is as follows:

> "Whenever the term of office for which any officer has been elected or appointed shall terminate by operation of law, by death, resignation or removal, leaving unperformed any duty imposed by law, it shall be the duty of the successor in office to do and perform all acts and complete all unfinished business which was commenced by his predecessor in office, and for this purpose it is made the duty of the incoming sheriff to execute deeds of conveyance of real estate on sales made by his predecessor on foreclosure or execution, and to perform every other act which was uncompleted

or unfinished by his predecessor at the time his term of office expired."

R. S. A. 1913, §2527.

Same as R. S. A. 1901, §1076.

In the case of McCauley v. Jones, 86 Pac. 422, 34 Mont. 375, the court held that any sheriff succeeding the sheriff who made the first deed, was the successor of such officer. In that case, the court said:

> "Under section 1237 of the Code of Civil Procedure, it is the duty of the sheriff who made the sale, if he still be in office, but if not, then of his successor, to make the deed. Any sheriff succeeding the sheriff who made the first deed was the successor of such officer."

In that case the sheriff sold the property at sheriff's sale on the 24th day of March, 1900. On January 19, 1905, a new deed was made by the then sheriff, John Q. Quinn, to the purchaser, being five years after the sale. In that case the court further said:

> "The law does not require the purchaser of a mortgage foreclosure sale to apply for the deed immediately upon the expiration of the year."

> "The term (successor) applies to any future occupant of an office held by a public officer just as he is the successor to any incumbents who preceded him, no matter when."

State v. O'Leary, 64 Minn. 207.

The sheriff's deed can be introduced in evidence although executed after suit has been commenced.

In the case of Reeve v. North Carolina Land and Timber Co., 141 Fed. 821-834; 72 C. C. A. 287, Mr. Justice Lurton, speaking for the court, on this particular point said:

> "The statute prescribes no time within which a deed may be made by the successor of a sheriff or other officer who made a sale, and we see no reason for denying the power in this case." Sheafer v. Mitchell, 109 Tenn. 203, 71 S. W. 86, et seq.

> "Finally, it is said that a complainant cannot acquire a title pending his suit and bring it forward by supplemental bill. That is not this case. The complainants had an imperfect but inchoate title when they brought this suit. They simply perfected the existing title by obtaining a valid sheriff's deed in place of an invalid one which attempted to convey the same title. It was not error to permit a curative deed to be thus brought forward. Gibson's Suits in Equity, 650; 2 Daniel Pl. & Pr. (4th Ed.) 1515 and 1516, and notes; Mutter v. Chanvel, 5 Rus. 42; Sadler v. Lovett, 1 Moll. 162; Jaques v. Hall, 3 Gray (Mass) 194."

Reve v. North Carolina Land & Timber Co., 141 Fed. 834; 72 C. C. A. 287.

"The mere omission of the purchaser to demand a deed from the sheriff at the expiration of the period of redemption, will not ordinarily defeat his absolute and continuous right to a conveyance after that time, where the sale has been properly made and the writ duly returned, and a proper record thereof made."

Wright v. Dick, 19 N. E. 306, 116 Ind. 538.

In Jones v. Webb, 59 S. W., 858, (Ky.) the land of Bowling and Jones was sold under execution. The sheriff's deed purported to convey the entire property as the property of Bowling. The sale was made in February, 1877. On March 12, 1894, the then Sheriff made a second deed to the assignees of the purchaser, conveying to them the land as the property of both Bowling and Jones.

The court said in that case:

"Although the deed made by the sheriff in 1877, by mistake, which it seems was overlooked by all the parties at the time, conveyed only Bowling's title to the land, this mistake did not divest Ireland and Pollock of their equitable title to the other half of the land, which they then held by virtue of the levy and sale under the execution and the assignment to them of the purchaser's bid. They were the equitable owners of the entire tract, with the legal title to only one half of it, as matters then stood, and were entitled by proper proceeding to

have the deed corrected. In Freeman on Execution §332, it is said 'Certainly a purchaser at execution sale is entitled to a conveyance in pursuance of and commensurate with his purchase. If a deed is given to him which for any cause is void or incorrect, he is entitled to another, one which shall be valid in form and conformable to the facts in the case.' The fact that the amended deed was made to Pollock and the heirs of Ireland is immaterial."

The Equities of the Bouldins.

The defendants Bouldin have filed their cross-bill seeking to have the cloud of this judgment sale removed from their alleged title.

They seek equitable relief, but they do not offer to do equity by tendering the amount due upon the judgment, which is a good and valid lien on the property they claim, even if the sale made by the sheriff was void.

Leo Goldschmidt is still the administrator of the estate of David W. Bouldin; that estate has not been closed; it is still pending as an unclosed estate in the Superior Court of Pima County, (Tr. p. 511-512).

The right and interest of the heirs of David W. Bouldin seek in this present action, so far as this judgment of the estate, after the debts are paid. The administrator is not a party to this acion. What the heirs of Bouldin seek in his present acion, so far as this judgment and sale is concerned, is to have the sheriff's deed set aside; to have the sheriff's sale decreed to be void, and

the property sold to be decreed to be owned by them; although administration is still pending upon the estate, and the debt of their ancestor has been decreed to be a valid lien on that estate, and they do not even offer to do equity, by tendering the amount of this lien.

We submit that they are in no position to ask equitable relief in this action, for he who seeks equity must do equity.

We therefore submit that the judgment is valid and not subject to collateral attack. The sheriff's sale was valid, and the State court had jurisdiction to order the curative deed to be made by the sheriff of Pima County, who is an officer of that court, and the successor in office of the sheriff who made the sale; and therefore, that order of the court is not subject to collateral attack. And we further submit that as the administration of the estate of Bouldin is still open and pending; as Goldschmidt is still the administrator; the heirs of Bouldin, in no event, are entitled to equitable relief, because they have not offered to do equity by tendering the amount of money which was adjudged by the District Court of the Territory to be a lien on the interest owned by their ancestor.

Respectfully submitted,

SELIM M. FRANKLIN,

Attorney for Joseph E. Wise and Lucia J. Wise.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

Santa Cruz Development Company, a Corporation,

Appellant,

—vs.—

Cornelius C. Watts, et al.,

Appellee.

No. 2719.

REPLY BRIEF OF JOSEPH E. WISE TO THE BRIEF OF SANTA CRUZ DEVELOPMENT COMPANY AS TO THE DEED FROM JOHN WATTS, ET AL., TO DAVID W. BOULDIN, OF SEPTEMBER 30, 1884, WISE EXHIBIT 16.

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STATEMENT.

Counsel for Joseph E. Wise, on the 2nd day of February, 1916, received the brief and supplemental brief for Santa Cruz Development Commpany, appellants, and desires to make reply to that portion of said briefs which attempts to show that the deed executed by the heirs of John S. Watts to David W. Bouldin, on Septem-

ber 30, 1884, was an executory contract, and not a deed. This subject is treated on pp. 78 to 113 of the brief of G. H. Brevillier, Esq., and pp. 45 to 49 of the brief of James W. Vroom, Esq., counsel for Santa Cruz Development Company.

Joseph E. Wise, in the brief heretofore filed upon his own appeal, has considered this deed on pp. 151 to 190 thereof, reference to which pages in his brief is hereby made. But as the Santa Cruz Development Company has raised some new questions and points, it is necessary briefly to reply thereto.

Deed not void as a conveyance.

Counsel assert that the deed is void as a conveyance, because not acknowledged. However, it is proved by a subscribing witness, Tr. p. 280, which under the Arizona statute in force at the time, was as valid as an acknewledgment. The law then in force is Compiled Laws of 1877, which we will quote:

> "Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved and certified, in the man-
>
> ner hereinafter provided."
>
> Sec. 2247 Comp. Laws of Arizona, 1877.
>
> "The proof of the execution of any conveyance whereby real estate is conveyed or may be affected

shall be: first by the testimony of a subscribing witness; * * *"

Sec. 2254 Id.

The form of the certificate of the officer is set forth in Sec. 2257 thereof.

This point is considered in our main brief on pages 170 to 180, in which we show that the deed was proved by a subscribing witness in 1888, under the Revised Statutes of 1887, in force at that time. The deed was proved in compliance with both the old law of 1877 and the new law of 1887.

John Watts had authority to execute conveyance.

The point raised by counsel that John Watts had no authority to execute the conveyance as attorney in fact, is fully answered in our main brief on pp. 155 to 176, in which we have shown, by reference to the testimony of John Watts himself, that he had such authority.

Rule of Construction.

The question involved is whether or not the deed was a present conveyance or an executory contract. This must be determined by a consideration of the deed itself, and not by what any of the parties to it may have said or done years afterwards. It is settled by abundant authority that where an agreement contemplates a further conveyance to vest title in the grantee, that then it is an executory contract. But the deed in question does not contemplate the execution of any further convey-

ance from the Watts heirs to Bouldin. It is an absolute conveyance of a present two-thirds interest. The deed conveys not only a two-thirds interest in Location No. 3; but a two-thirds interest in other lands, to-wit, Location No. 2, which had theretofore been located and approved by the Surveyor General, and Location No. 4, which had also been duly approved, and the title to which had passed out of the government.

We call particular attention to the habendum part of the deed, as set forth on page 276 of the Transcript of Record, the mere reading of which shows conclusively that a present title was conveyed, and no further conveyance was contemplated from the Watts heirs to Bouldin. For further consideration of this deed we refer to our main brief, pp. 186-190.

Situation of the Parties.

The situation of the parties is only considered when an instrument is ambiguous and requires construction. But there is no ambiguity in the deed from the Watts heirs to Bouldin. The language is plain and simple, and what is required is merely a careful consideration of its language; an inspection of the deed itself; for it clearly expresses what the parties desired to do, and what they did.

At the time of its execution Bouldin had deeds from other persons who claimed to be heirs of Luis Maria Baca, Tr. pp. 261-267. He claimed an interest not only in Location No. 3, but in other Baca locations, and it

was not only to engage his services, but also to compromise these conflicting claims, that the deed from the Watts heirs to him was executed. There is absolutely no evidence in this case in regard to the other tracts of land conveyed by the deed from the Watts heirs to Bouldin; and so far as we know, there may have been other differences and disputes in regard to those lands that the parties wished to settle and compromise. Nor does the evidence show what services Bouldin rendered in regard to those other tracts of land, nor how large were the expenditures he may have made in endeavoring to obtain the rights of the Watts heirs thereto.

Executory consideration.

Counsel assert that the only consideration for the deed were the services which Bouldin agreed to render. But this is not so. The deed itself recites that one of the considerations was "for the purpose of compromising and settling the claims of title between the parties of the first and second part." Counsel absolutely and utterly ignore this consideration, which was perhaps the most important and vital consideration that actuated the heirs of Watts to execute the deed. Whether it was or not, as shown in our main brief, the compromise of conflicting titles was an absolutely good consideration for the deed.

No reward without effort.

Counsel argue that there was nothing for Bouldin to do, and that he did nothing. This statement is not based upon any evidence in the record. Bouldin, as

before stated, was to perform services in regard to Location No. 2 and Location No. 4, as well as Location No. 3. He may, for aught this record shows, have performed most valuable services in regard to all these tracts of land, and made extensive expenditures of money. Counsel state in their brief, that in 1885 Bouldin entered into an agreement with Mr. Robinson to carry out the provisions of the order of the Commissioner of the General Land Office, dated March 12, 1885, authorizing Mr. Robinson to relocate the grant. There is no evidence in the record as to this fact, if it be a fact, and we regret that counsel has referred to matters not in the record. But if it were a fact, it shows that Mr. Bouldin did make efforts to do something in regard to Location No. 3.

Counsel further says, in his brief: "The record is clear and convincing that after conferences with Mr. Robinson in Washington, culminating in their written agreement executed there on June 8, 1885, Mr. Bouldin became convinced that it was to his interest to abandon and repudiate his contract of September 30, 1884, with John Watts, and work with Mr. Robinson," etc., p. 107 of brief of Mr. G. H. Brevillier.

There is absolutely no evidence in this case that Mr. Bouldin ever had a conference with Mr. Robinson in Washington, or anywhere else; there is no evidence that Mr. Bouldin abandoned or repudiated his contract of September 30, 1884, or that he agreed to work with Mr. Robinson.

Again, on page 109 of his brief, counsel says: "In his

partitions with Mr. Robinson, Mr. Bouldin clearly and emphatically stated that he was acting as attorney in fact for his son; and in his conveyance to his sons Mr. Bouldin conveyed the interest in the 1866 location which he had "purchased" for them with their money. (P. R. 90). This assertion of an adverse interest and association with a hostile party absolutely terminated the agency."

The reference (P. R. 90) is to page 90 of the Transcript of Record. We turn to that page to ascertain where any such evidence is in this case; for we assert there is no such evidence. On p. 90 of the Transcript we find a part of Par. XXI of Amended Answer of defendants Bouldin, which commences on p. 81 of Transcript, and in this amended answer is the allegation as follows:

> "They further say that whatever interest David W. Bouldin, Sr., took or had in the premises described in Par. II of the bill of complaint was taken and held in trust by the said David W. Bouldin, Sr., for his sons * * *"

By stipulation of the parties, made in open court, this allegation was deemed denied.

> "It was further stipulated in open court that all new matter set forth in each of the answers of the respective defendants and intervenors should be deemed and considered as denied by the plaintiffs, and each of the other defendants and intervenors,

without the necessity of filing further replies or replications thereof." Tr. p. 153.

In the face of this stipulation, denying the allegations above quoted in the answer of the Bouldins, counsel for Santa Cruz Development Company asserts as a fact, that David W.Bouldin purchased the interest from the Watts heirs, for his sons, and with their money, and asserted an adverse interest which terminated the agency. And his authority for this statement is the allegation in the answer of defendants Bouldin, which by stipulation in open court is deemed denied, not only by Joseph E. Wise, but by the Santa Cruz Development Company itself.

No evidence, no deed, no testimony, was introduced upon the trial by anyone, on the subject.

Again, counsel states in his brief, p. 109, that the transaction between Bouldin and Ireland and King was merely an employment of sub-contractors. There is absolutely no evidence of any employment of Ireland and King whatsoever. The evidence is simply a deed from Bouldin to King, of date February 21, 1885, Defendants Wise Exhibit 18, Tr. 312-314. This deed is an absolute conveyance of a 1-9 interest, or Bouldin's interest in the 1863 location; and at the end of the deed is an agreement "that all necessary expenses incurred in locating all or any part of the above described lands, or in perfecting title or obtaining other land or land certificates in lieu of said Location No. 3, shall be borne by the parties hereto in proportion to their several interests." Tr. 314.

We regret exceedingly to call attention to the misstatements of the record which counsel for Santa Cruz Development Company has seen fit to make in his brief; but we are compelled to do so for the reason that to permit such statements to go unchallenged, would lead the court to believe that the facts stated by counsel in his brief are supported by the record in this case, when as a matter of fact, they are not.

We note that counsel does not refer to the pages of the Transcript of Record in support of his statements of the facts which he sets forth in his brief, relative to the deed from the Watts heirs to Bouldin, as required by Rule 24, Par. I, sub div. (c), except the one reference to page 90, which we have above considered, and we can do no more than to call attention of the court to a few of his statements which we say are not supported by the evidence in the record.

The question under consideration is simply whether or not the deed from the Watts heirs to Bouldin was an executory contract or a conveyance of a present interest. This question must be determined, as before stated, by the words of the instrument itself. And we, therefore, will not further consider the various statements which counsel makes in his brief as to what David W. Bouldin did, or did not do, during the many years after the execution of that deed; such matters are utterly immaterial.

The Santa Cruz Development Company cannot attack the deed from Watts' heirs to Bouldin.

The Santa Cruz Development Company is in no po-

sition to attack the deed from the Watts heirs to Bouldin, even if construed to be an executory contract to convey.

Under that deed the Watts heirs were to have an undivided one-third interest in the lands therein described. That was the agreement the Watts heirs themselves made as binding upon themselves. In no event were they to have more than an one-third interest. We will quote from the deed itself:

> "And upon the final and complete settlement of the title to said lands, and all matters connected therewith, the parties of the first part (heirs of Watts) are to have, own and possess in fee an undivided one-third of the net lands recovered and one undivided one-third of the land certificates obtained, and an undivided one-third of all the moneys and other property recovered and secured by the party of the second part, net." Tr. 277-278.

This deed, or agreement, or whatever it may be called, was in force in 1884 when it was made, and never has been abrogated; it never has been set aside. The Watts heirs have never repudiated it.

All the Watts heirs have done is to convey, by deed made nearly thirty years after the agreement with Bouldin was executed, their interest to James W. Vroom. The deed from John Watts to Vroom is dated February 3, 1913. Tr. p. 412.

If the Watts heirs were bound by their agreement to have no more than a one-third interest, upon the final

settlement of the title, James W. Vroom has acquired by his deed, no greater right than his grantors had.

Vroom, by deed dated June 11, 1913, conveyed his interest to the Santa Cruz Development Company, Tr. p. 412, of which he is president, Tr. p. 312. That company has acquired no greater interest than Vroom had; and neither Vroom nor the Santa Cruz Development Company has acquired a right to any other or greater interest than the Watts heirs had.

They are bound by the agreement of the Watts heirs, as set forth in the deed from the Watts heirs to Bouldin, to-wit: "to have, own and possess in fee an undivided one-third of the net lands recovered, etc.," and no more.

If this deed were construed to be an executory contract, and if this were a suit brought by the heirs of Watts themselves, to have it set aside for any reason whatsoever; even then, the titles having been settled before the suit was brought, the Watts heirs, or their grantees, having now a good title to their one-third interest, being all the title they were to own or possess under the contract, a court of equity would refuse to set it aside, but on the contrary would enforce it.

It is too late for the Watts heirs, or anyone claiming under them, after they have received the full measure of all they are entitled to under the contract, to hold on to that, and seek to recover the consideration paid to the other party.

The Watts heirs have never attempted any such repu-

diation. The Santa Cruz Development Company, who was not a party to the contract at all; who acquired its deed with full notice, both actual and constructive, for the deed from Watts' heirs to Bouldin has been duly recorded since 1888, do seek to set this contract aside; and seek in this action to acquire the 2-3 interest which the Watts heirs themselves were not entitled to, and never claimed.

We therefore submit that the deed from the Watts heirs to Bouldin was a conveyance of an undivided 2-3 interest, and was not an executory contract to convey, so far as this 2-3 interest was concerned. That this deed further contained a positive agreement on the part of the Watts heirs, that all they were to have, or ever should be entitled to, was an undivided 1-3 interest in whatever lands or titles finally recovered or obtained; that this agreement has never been abrogated, annulled or set aside, and that all the Watts heirs, or the Santa Cruz Development Company, its grantee, is entitled to, is an undivided 1-3 interest in the title as finally adjudicated by the Supreme Court of the United States in the case of Lane vs. Watts, 234 U. S. 525-542; and this undivided 1-3 interest of the ancestor John S. Watts we have conceded to them all the way through this case; and in the main brief we heretofore filed herein, to which we respectfully refer, shows with accuracy what that interest is. (Our main brief, pp. 236-237.)

We respectfully submit, for the reasons herein stated, and as more fully stated in our main brief, that this deed

is a valid conveyance, and that Joseph E. Wise and the Intervenors, are now the owners of said 2-3 interest, in the proportions as set forth in our main brief, at pages 250-252 thereof.

Respectfully submited,

SELIM M. FRANKLIN,

Attorney for Joseph E. Wise and Lucia J. Wise, Appellants.

No. 2719

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SANTA CRUZ DEVELOPMENT COMPANY,
Appellant,

Against

CORNELIUS C. WATTS et al.,
Appellees.

REPLY BRIEF IN BEHALF OF SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT.

G. H. BREVILLIER,
Counsel for Santa Cruz Development Company.

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The only function of the survey was to segregate the land from the Public Domain, as legal title passed from the United States to the heirs of Baca on April 9, 1864, to the 1863 tract, which had been selected and approved by the same metes and bounds and beginning point as used at bar (*Lane v. Watts,* 234 U. S. 525; 235 U. S. 17).

The Act of 1860 which created the grant gave a power of selection, and also the right to a survey when required by the heirs. Under the Act of Congress of June 2, 1862 (12 Stat. 410), referred to in the opinions in *Lane v. Watts,* it was provided:

> *"But nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States shall be construed either to authorize such officers to pass upon the validity of the titles granted by or under such laws, or to give any greater effect to the surveys made by them than to make such surveys prima facie evidence of the true location of the land claimed or granted, nor shall any such grant be deemed incomplete for want of a survey or patent when the land granted may be ascertained without a survey or patent."*

Furthermore, it is well settled that

> *"the survey is one thing and the title another. * * * A survey does not create a title; it only defines boundaries. Conceding the accuracy of a survey is not an admission of title"* (*Russell v. Maxwell Land Grant Co.,* 158 U. S. 253, 259).

A grant delivered out for survey, as the 1863 tract was on April 9, 1864, means a perfect title.

United States v. Hanson, 16 Pet. 196, 200
United States v. Boisdore, 11 How. 63, 92

In the case at bar there was a definite description of a specific tract, easily capable of identification, and, therefore, segregation by survey was not necessary to pass title.

Langdeau v. Hanes, 21 Wall., 521, 530, 531 (Approved in *Shaw v. Kellogg,* 170 U. S. 312, 341, and in *Joplin v. Chachere,* 192 U. S. 94)
Snyder v. Sickels, 98 U. S. 203, 213, 214
Morrow v. Whitney, 95 U. S. 551
Whitney v. Morrow, 112 U. S. 693, 695
Glasgow v. Hortiz, 1 Black 595, 601, 602
Act of June 2, 1862 (12 Stat. 410)

The function of the survey was not to pass title, but to mark out the land so that its boundaries might be officially monumented, to designate it on a plat of survey according to the township and section system (the approved method of describing Western lands) and to inform the Government what land it had left. The United States fixes the boundaries between its remaining land and the land of its grantee.

Russell v. Maxwell Land Grant Co., 158 U. S. 253
Langdeau v. Hanes, 21 Wall. 521, 530
Joplin v. Chachere, 192 U. S. 94
U. S. v. Montana Land Co., 196 U. S. 573, 578

The orderly procedure in taking possession of public lands granted by the United States, where the grant is not in confirmance of a previous possession, is to wait until the Surveyor General marks out on the ground the lines of the grant, even though anyone could readily ascertain them without official aid

The delay of the ministerial officers of the Government in performing the ministerial act of the survey neither divested the title nor suspended its vesting.

> *Stalker v. Oregon Short Line,* 225 U. S. 142, 153
> *Glasgow v. Hortiz,* 1 Black 595, 601, 602
> *Lytle v. Arkansas,* 9 How. 314, 333

In *Lane v. Watts*, Judge Barnard, who wrote the opinion on final hearing in the Supreme Court of the District of Columbia, said:

> "The purpose of such survey is to separate or segregate the land, the title to which passes to the grantees, from the Public Domain, so as to enable the grantees to take possession and maintain their property lines, and the officers of the Land Department to know what are public lands."

The United States Supreme Court in *Lane v. Watts,* 235 U. S. 17, said of its opinion in 234 U. S. 525

> "The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the Float and its approval by

> the officers of the Land Department and order for survey in 1864 in pursuance of the Act of 1860; (12 Stat. 71, 72). A survey, it was said, was necessary to segregate the land from the Public Domain and the condition was satisfied by the Contzen survey."

In the case of *Stoneroad v. Stoneroad,* 158 U. S. 240, cited by the United States Supreme Court in *Lane v. Watts,* the Court held that a survey was necessary for the definite segregation and delimitation of the land, and said:

> If there was no legal official survey "we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant."

The *Stoneroad* case was an ejectment action, brought against an individual who claimed land outside of the official survey of the grant but inside what was claimed to be the correct lines of the grant. The Court held that the Government survey was the only evidence to determine whether or not there was a conflict.

As a sovereign, the United States retains the right of survey to mark on the ground the boundaries of its grants. The Baca heirs received legal title to the 1863 tract on April 9, 1864, and their title to the specific land was then complete; but they had not the right to survey and mark on the ground the description used in the notice of selection, as that

> "Would reverse the statutory order of powers" and "would impair the Government's right of

> survey and force it into controversies over surveys made by its grantees."
>
> *United States v. The Montana Lumber Co.,* 196 U. S. 573, 578

The Contzen survey, therefore, definitely segregated from the Public Domain the land within the specified selection made on June 17, 1863, to which title passed from the United States on April 9, 1864, and segregated the land only to the extent that it furnished "recognition of boundaries" (*Glasgow v. Hortiz,* 1 Black 595, 601, 602) and physically monumented and marked it.

In the *Prentice* cases, a metes and bounds description had been used in the deed, *although at the time the deed was executed no survey had been made nor any lands officially allowed to the grant.* Nevertheless the Court said (154 U. S. 163):

> "The selection had definiteness about it to a certain extent; it was a thing which could be conveyed specifically; and which Armstrong undertook to convey specifically."

The deed was held to the specific description, notwithstanding that the selection had not been "tied down" to any specific description, nor the right to any particular land officially allowed at the time of the deed.

Notwithstanding that the metes and bounds of the 1863 tract had not been officially monumented on the ground at the time of the Hawley deed, this cannot be considered in any way in construing that instrument. Nothing that the surveyor might do

or might not do could change the fact that legal title had passed from the United States to the Baca heirs on April 9, 1864 to the specific land of the 1863 tract, under a selection with the same description as in the deed from the Baca heirs to John S. Watts of May 1, 1864.

Effect of conditional allowance of amended location

Under the Commissioner's order of May 21, 1866 (P. R. 177), it was incumbent upon the Surveyor General to examine the 1866 tract to ascertain whether it was vacant land not mineral.

Had the Surveyor General found that it was not proper land, then the conditional allowance of May 21, 1866 would have been expressly inoperative. If the Surveyor General had found that the 1866 tract was in fact "vacant land not mineral," and if the Secretary of the Interior had not, before the approval of such a survey, overruled the Commissioner's action of May 21, 1866, title to the 1866 tract would have passed absolutely from the United States.

The Commissioner's power to act in the disposal of public lands, in administration of the Public Land laws, is plenary and final, unless and until overruled by the Secretary of the Interior prior to the passing of legal title.

Beley v. Naphtaly, 169 U. S. 353, 365
Ballinger v. Frost, 216 U. S. 240

United States v. Schurz, 102 U. S. 378, 396, 402, 404
Moore v. Robbins, 96 U. S. 530, 533
Bishop of Nesqually v. Gibbons, 158 U. S. 155, 166, 167
United States v. Barnes, 222 U. S. 513, 521
Cosmos Co. v. Gray Eagle Co. 190 U. S. 301, 309

Number of Baca Locations No. 3

In the Watts and Davis brief, the statement is repeatedly made that there was and could be only one Baca Float No. 3.

As a matter of fact, there have been three tracts to which that name did and could apply:

1. The Bosque Redondo selection of 1862 which was withdrawn before approval.
2. The 1863 tract which was absolutely confirmed on April 9, 1864.
3. The 1866 tract which was first conditionally confirmed in 1866 and finally disallowed.

While the Baca heirs could ultimately keep only one tract as Location No. 3, still they could and did deal simultaneously with two tracts by that name, and could and did have varied titles thereto, each of which might be the subject of quitclaim or conveyance.

It is with the actual supposed situation in 1870 that this Court must deal, and not with the con-

structive legal situation created by the Secretary's decision of July 25, 1899 (29 L. D. 44). Men convey what they think they own; not what they unknowingly own (*Russell v. Trustees,* 1 Wheat. 432, 436, 437).

Ascertaining intention

Of course the aim of all interpretation is to find the intention of the parties. In a deed that can be determined only from the deed itself (main brief pages 32, 33, 37, 38). As the result of centuries of experience, the courts have formulated definite rules to ascertain this intent.

If all the calls of description point to one tract, that tract alone passes, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description.

4 A & E Ency. (2nd Ed.) Secs. 799, 800
Washburn on Real Property (6th Ed.) Sec. 2319
Tiedeman on Real Property (2nd Ed.) Sec. 829

In case there is a conflict between general calls and a complete description by metes and bounds, then the metes and bounds control (main brief, pages 38 to 46).

No cases can be found in variance with these rules. Appellees' cases, so far as we have had time to examine them, present nothing to the contrary,

and the general language of the opinions, when applied to the facts, show that the cases are not at variance with the rules we have given.

Counsel for appellees Watts and Davis cite many cases to the effect that the intention is to be gathered from the whole instrument. This is true only to the extent that each and every part of the instrument must be considered and retained if possible, and that the intention must be gathered from the instrument itself and not from any "conjectural" intent based on a surmise that the metes and bounds were not deemed of importance by the parties to the Hawley deed. This is discussed on pages 37, 38 and 66 of our main brief.

Function of metes and bounds

The metes and bounds of the Hawley deed were inserted to furnish the clearest and most specific evidence of the grantor's intent.

The title references were inserted simply to show the grantor's source of title (main brief, page 64). They refer to the specific description, in accordance with the customary method of conveyancing, and furnish a guide to future examiners of the title.

Certainly an intention to convey the 1863 tract is not shown by the insertion in the Hawley deed of the metes and bounds of the 1866 tract.

If Judge Watts had intended to convey Baca Float No. 3 wheresoever or ultimately situate,

> "It is remarkable that he did not do so in the very few words necessary to express that idea."
>
> *(Prentice v. N. P. R. R. Co.,* 154 U. S. 163, 175, 176.)

Santa Rita Mountains

On page 35 of the Watts and Davis brief, the statement is made:

> "A large part of the 1863 location was composed of the spurs and ridges of the Santa Rita Mts., and it was generally considered the foothills of the Santa Ritas."

This is directly contrary to Mr. Contzen's uncontradicted testimony (P. R. pages 381 to 383), his map (P. R. p. 379) and the map which he made (S. C. D. Co. Exhibit 13 sent up with the record) showing the location of the two tracts with reference to the Santa Rita Mts. The "spurs and ridges" to which he refers are "along the side lines of those (Mexican) grants." The only real spur of the Santa Ritas within the 1863 tract is the San Cayetano Range (P. R. 382) shown on the map (P. R. 379). Only in a "few miles" of the overlap near Salero Hill is there any part of the Santa Rita Mts. or the foothills thereof.

In S. C. D. Co. Exhibit 13, made by Mr. Contzen in 1905 for the Land Department, for the purpose

of "showing the Santa Rita Mts. with reference to the Baca Float" (Report of Surveyor General Ingalls, page 277 of Record in *Lane v. Watts*), the Santa Rita Mts. extend only into the northern and eastern part of the overlap, while the San Cayetano Mts. and Grosvenor Hills are the only hills or mountains within so much of the 1863 tract as is not within the overlap.

Plaintiffs' application of general calls and references

On page 35 of the Watts and Davis brief, the statement is made that the expression in the Hawley deed, "granted to the heirs of Luis Maria Cabeza de Baca by the United States", applies to the 1863 location. That is correct; but the expression equally applies to the 1866 tract (main brief, page 65). Until 1899, that conditional grant was supposed to be valid.

The statement is then made that the words "by said heirs conveyed to the party of the first part by deed dated on the first day of May, 1864" correctly describe the 1863 location. If that be true, it is also true as to the 1866 tract (main brief, pages 65 and 66). It certainly by itself can apply to locations two and four, which together with the 1863 tract were described in the deeds of May 1, 1864.

The statement is then made that the clause following the specific description in the Hawley deed "the said tract of land being *known as* Location No. 3

of the Baca series" describes the 1863 location. That is untrue by the plaintiffs' own pleading (P. R. 7) and the uncontradicted evidence in this case (P. R. 247, 248, 251).

Statutes of Limitation as to Adverse Possession

In Mr. Franklin's brief, he admits that the general rule is that title by adverse possession against a grantee from the United States can be initiated only after the approval of the official survey. Nevertheless, he argues that in *Lane v. Watts,* the United States Supreme Court intended to take this case from the general rule.

In *Lane v. Watts,* the United States Supreme Court in both opinions, referred with approval to the *Stoneroad* case (158 U. S. 240). In that case the Court expressly held that until there was an official survey, the grant owner could not maintain ejectment against an adverse occupant, as the courts would be

> "without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant."

The entire subject of survey is discussed on pages 1 to 7 herein.

Respectfully submitted,

G. H. Brevillier,

Counsel for Santa Cruz Development Company.

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In the United States

Circuit Court of Appeals

For the Ninth Circuit

February Term, 1916.

No. 2719.

The Santa Cruz Development Co. et al.,
Appellants,

vs.

Cornelius C. Watts et als.,
Appellees.

Brief on Behalf of the Bouldin Appellees

JOSEPH W. BAILEY,
JOHN H. CAMPBELL,
WELDON M. BAILEY,
Attorneys for the Bouldin Appellees.

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The Santa Cruz Development Co. et al.,
Appellants,

vs.

Cornelius C. Watts et als.,
Appellees.

Brief on Behalf of the Bouldin Appellees

A STATEMENT OF THE CASE.

This suit was begun on June 23rd, 1914, in the District Court of the United States for the District of Arizona, by a bill in equity to quiet title to a tract of land containing 99,289.39 acres, located in Santa Cruz County, Arizona, and known as Baca Float No. 3. The land was granted to the heirs of Luis Maria Baca by the United States by an Act of Congress, approved June 21, 1860. The plaintiffs claim title under a deed from John S. Watts, grantee of the heirs of Baca,

to Christopher E. Hawley, dated January 8th, 1870, and by mesne conveyances from Hawley. The deed from John S. Watts to Christopher E. Hawley dated January 8th, 1870, will hereinafter be referred to as the Hawley deed.

On May 30, 1871, the heirs of Baca executed a further deed to John S. Watts, and the plaintiffs claim that the title which passed to John S. Watts by this deed inured to the benefit of Christopher E. Hawley. This deed will be hereinafter referred to as the "confirmatory" deed.

The questions of the operation and effect of these two deeds are the first questions for the consideration of the court, and if this court agrees with the trial court, that decision will render immaterial all other questions in this case, except the single question of the claim of Joseph E. Wise and Margaret W. Wise to an undivided one-thirty-eighth interest, each, under deeds from certain alleged heirs of Baca.

Hawley conveyed his interest to John C. Robinson. In 1892, John C. Robinson conveyed the north half of the land to James E. and P. W. Bouldin. The Bouldin defendants in this case are the successors in interest of James E. and P. W. Bouldin. In 1893 John C. Robinson conveyed the south half of the land to Alex. F. Mathews, of West Virginia, and the plaintiffs in this case are the successors in interest of Alex. F. Mathews.

The Santa Cruz Development Company contends that the Hawley deed did not convey the title to the land

in controversy, and that they have the entire title to the land through conveyances from the heirs of John S. Watts, dated in the autumn of 1899 and in 1913.

The defendant, Joseph E. Wise, claims an undivided one-thirty-eighth interest under deeds from certain alleged heirs of Luis Maria Baca, dated in 1913. He further claims approximately a two-thirds interest in the land under deeds from the widow of John Ireland and from Wilbur H. King. This last claim of title is based upon the theory that the Hawley deed did not convey the title to the land in controversy, and that an undivided two-thirds interest therein passed to David W. Bouldin (father and grandfather of these defendants) by a deed dated September 30th, 1884, from the heirs of John S. Watts. Joseph E. Wise claims one-ninth of that two-thirds interest under a conveyance from David W. Bouldin to John Ireland and Wilbur H. King in 1885, and by mesne conveyance from them to him. He claims the remainder of that two-thirds interest under a deed dated in 1899, from the Sheriff of Pima County to Wilbur H. King, made under a judgment of the District Court of Pima County in certain judicial proceedings by King and Ireland against David W. Bouldin.

Margaret W. Wise claims an undivided one-thirty-eighth interest under the same deeds from certain alleged heirs of Baca upon which Joseph E. Wise bases his claim to an undivided one-thirty-eighth interest.

In addition to their claim to the north half of the land under the deed from John C. Robinson to P. W. and

James E. Bouldin, these defendants have a claim to an undivided two-thirds interest under another chain of title, namely, the deed dated September 30th, 1884, from the heirs of John S. Watts to David W. Bouldin. They make claim under this deed in the event and only in the event, that this court shall decide that the Hawley deed did not convey the title to the land in controversy. In that event, the title to the land in controversy was in the heirs of John S. Watts on September 30th, 1884, and these defendants claim an undivided two-thirds interest under a deed from those heirs dated on that day. They claim that the deed from David W. Bouldin to John Ireland and Wilbur H. King in 1885 conveyed no title, for certain reasons discussed further on, and that the deed made by the Sheriff of Pima County to Wilbur H. King, as a result of certain judicial proceedings by Ireland and King against David W. Bouldin, was also invalid for reasons discussed further on.

At the trial of the case at bar in the District Court at Tucson in March, 1915, the court decided that the Hawley deed conveyed the property in controversy, and that the title which passed to Watts by the confirmatory deed of 1871 inured to the benefit of Watt's previous grantee, Hawley. The court further decided that the deeds of 1864 and 1871 from the Baca heirs to Watts only carried eighteenth-ninetenths of the entire title to the land in controversy, and that one-nineteenth belongs to Joseph E. Wise and Margaret W. Wise through conveyances in 1913 from certain persons who claimed to

be heirs of an Antonio Baca, alleged to have been a son and heir of Luis Maria Baca.

The Santa Cruz Development Company appealed from the entire decree. Joseph E. Wise appealed from that portion of the decree which decided that the Hawley deed passed the title to the land in controversy and that the confirmatory deed inured to the benefit of Hawley. Margaret W. Wise did not appeal; the Bouldin defendants and the plaintiffs appealed from that portion of the decree which awarded the one-thirty-eighth interest each in the land in controversy to Joseph E. and Margaret W. Wise.

The Bouldin interest under the deed of 1884 from the heirs of John S. Watts to David W. Bouldin is somewhat greater than under the Hawley deed; but we supported the contention of the plaintiffs in the trial court, because we believed then and believe now that the Hawley deed conveyed the land in controversy.

THE FACTS.

The facts ,or such of them as affect the rights of these defendants, are as follows:

The sixth section of an Act of Congress approved June 21st, 1860 (12 Stat. 71) provided

> "And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them, in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, That the right hereby granted to said heirs or Baca shall continue in force during three years from the passage of this Act, and no longer."

On June 17, 1863, John S. Watts, as attorney for the heirs of Luis Maria Baca, selected the land here in controversy as the third of the five tracts of land which were selected by the heirs of Luis Maria Baca under the above Act of Congress.

On April 9, 1864, the Commissioner of the General Land Office approved that selection and ordered a survey thereof, the plat and field notes of which survey were to be returned to the General Land Office at Wash-

ington and filed therein as muniments of the title of the heirs of Baca. This survey was never made for various reasons, and no survey of the tract was made by the United States until the Contzen survey.

On June 22, 1914, the Supreme Court of the United States in the case of Lane v. Watts, 234 U. S. 525 (rehearing denied with opinion 235 U. S. 17) decided that title to the land selected by John S. Watts, as attorney for the heirs of Luis Maria Baca, on June 17, 1863, and in controversy in this case, passed out of the United States and into the heirs of Baca by the approval of the Commissioner and order for survey on April 9, 1864; that thereafter the Land Department ceased to have jurisdiction over the land, except for the purpose of surveying the outboundaries thereof in order to segregate the same from the public lands of the United States; enjoined the Secretary and Commissioner from treating it as public land and ordered them to place on file the field notes and plot of survey made by Philip Contzen for the purpose of defining the outboundaries of said land and segregating the same from the public lands of the United States. The field notes and plat of the Contzen survey were filed in the Office of the Commissioner of the General Land Office on or about December 14, 1914, in pursuance to the mandate of the Supreme Court of the United States.

On May 1, 1864, the heirs of Luis Maria Baca executed a deed (Rec., p. 154) to John S. Watts conveying the lands here in controversy, which deed was acknowledged May 2, 5, and 14, 1864, and duly recorded.

On May 1, 1864, the heirs of Luis Maria Baca also executed a further deed (Rec., p. 165) to John S. Watts conveying the land in controversy, which deed was acknowledged on that day and duly recorded.

On April 30, 1866, John S. Watts addressed the following letter (Rec., p. 176) to the Commissioner of the General Land Office:

Washington City, April 30, 1866.

"Hon. J. M. Edmunds,

Commissioner of Land Office,

Sir:

You will find, by reference to the papers on file in your office, that on the 17th of June, 1863, I filed with the surveyor-general of New Mexico an application for the location of one of the five locations confirmed to the heirs of Luis Maria Cabeza de Baca under the tenth section of the act of Congress approved June 21, 1860. I further state that the existence of war in that part of the Territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land de-

signed or intended to be included in said location. Mr. Wrightson was killed by the Indians and no survey has been made because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the surveyor-general of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence west 12 miles 36 chains and 44 links to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which would have been set apart by the location as first solicited, but is not the land intended to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given to the surveyor-general to correct the mistake.

Yours, respectfully,

JOHN S. WATTS,

Attorney for Heirs of Luis Maria Cabeza de Baca."

On May 21, 1866, the Commissioner of the General Land Office replied (Rec., p. 177) to that letter as follows:

Department of the Interior—General Land Office.

Washington, D. C., May 21, 1866.

"John A. Clark, Esq.,

Surveyor-General, Santa Fe, N. Mex.

Sir:

On the 9th of April, 1864, instruction was issued by this office to Levi Bashford, surveyor-general of Arizona, for the survey of one of the five locations confirmed to the heirs of Don Luis Maria Baca under the Sixth Section of the Act of Congress approved June 21, 1860.

The starting point of this location of the claim was to be a point 1 1-2 miles from the base of the Salero Mountain, in a direction north 45 degrees east of the highest point of said mountain.

The original instructions as aforesaid have been this day returned to this office by John S. Watts, attorney for heirs of Luis Maria Cabeza de Baca, dated April 30, 1866, together with a diagram of the intended location, but erroneously described by him in his application of the 17th June, 1863, addressed to you as the surveyor-general of New Mexico. The papers thus returned are herewith transmitted to you with directions that you cause

the survey to be executed in accordance with the amended description of the beginning point which is described in Mr. Watts' application of the 30th April last, provided by so doing the outboundaries of the grant thus surveyed will embrace vacant lands not mineral.

I am, very respectfully,

J. M. EDMUNDS,
Commissioner."

No survey of the attempted amended location of 1866 was ever made by the United States for various reasons not material to this case.

From 1866 until July 25, 1899, the metes and bounds described in the letter of April 30, 1866, from John S. Watts to the Commissioner of the General Land Office were treated by the claimants and by the Land Office as the proper description by metes and bounds of the Baca Float No. 3.

On July 25, 1899, the Department of the Interior remitted the claimants to the original location of 1863, holding that the attempted amendment in 1866 was in reality a new location, and that the department was without power to permit such a new location after the expiration of the three years limited by the Act of June 21, 1860.

On January 8, 1870, John S. Watts executed a deed (Rec., p. 193) conveying the Baca Float No. 3 to Christopher E. Hawley. The description of the land in this

deed will be set out in full further on. Whatever title to the land now in controversy passed to Christopher E. Hawley by the deed dated January 8, 1870, from John S. Watts had become vested previous to 1892 in John C. Robinson, of Binghamton, New York.

On May 30, 1871, certain persons claiming to be all of the heirs of Luis Maria Baca executed a deed (Rec., p. 197) to John S. Watts, acknowledged on the same date and duly recorded, by which the said heirs ratified and confirmed the title made by them and by their attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1864, for the land now in controversy, and relinquished and quit-claimed to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described. This deed contained a covenant that the grantors were all the heirs of Luis Maria Cabeza de Baca.

John S. Watts died some time previous to September 30, 1884.

On September 30, 1884, and after the death of John S. Watts, his heirs conveyed to David W. Bouldin by a deed(Rec., p. 272) dated on that day an undivided two-thirds of the land now in controversy, describing it as Location No. 3, and by the metes and bounds of the original location of 1863. This deed was signed, sealed and delivered in the presence of B. H. Davis and David K. Osbourn, and was recorded on March 25, 1885, in Pima County, Arizona, without acknowledgement, and re-re-

corded with an acknowledgement in Pima County, Arizona, on April 18, 1888, in Volume 14, Real Estate and Mortgages, page 597. The above deed was executed by John Watts for himself and as attorney in fact for the other heirs of John S. Watts.

On February 25, 1885, by deed (Rec., p. 312) acknowledged on that date and duly recorded, David W. Bouldin conveyed to John Ireland and Wilbur H. King an undivided one-third of one-third of all right, title and interest owned and controlled and possessed by the said David W. Bouldin in Location No. 3 of the Baca Series, describing it by the metes and bounds of the original location of 1863.

On November 19, 1892, John C. Robinson conveyed to Powhatan W. Bouldin and James E. Bouldin by deed (Rec., p. 400) acknowledged on the same day and duly recorded, the north half of Baca Location No. 3, describing it as the northern half of the tract known as Location No. 3 of the Baca Series and by the metes and bounds of the north half of the attempted amended location of 1866.

Whatever interest passed from John C. Robinson to James E. and P. W. Bouldin by this deed described above is now vested one-half in the defendant, Jennie N. Bouldin, and one-half in the infant defendants, David W. Bouldin and Helen Lee Bouldin, the children of James E. Bouldin by his first wife, Daisy Belle Bouldin, of Austin, Texas.

On March 13, 1893, Messrs. John Ireland and Wilbur H. King instituted suit (Rec., p. 456) against David W. Bouldin in the District Court of Pima County, Arizona, to recover the sum of $5,000, and accrued interest, due by promissory note executed by the said David W. Bouldin and payable to the order of the said Ireland and King; and on March 14, 1893, an attachment (Rec., p. 464) was levied on the interest of David W. Bouldin in the lands here in controversy.

In December, 1893, David W. Bouldin died, and thereafter Leo Goldschmidt was duly appointed administrator of the estate of David W. Bouldin, and substituted as defendant in the case.

On the 2d day of May, 1895, the court rendered a judgment (Rec. p. 468) against Leo Goldschmidt as administrator of the estate of David W. Bouldin, for the sum of $8550.00, with interest and costs, and ordered that "said amount be paid by the said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased," and further ordered a foreclosure of the "attachment lien as the same existed on the 14th day of March, 1893."

Under the foregoing judgment, and on the 8th day of July, 1895, R. N. Leatherwood, Sheriff of Pima County, Arizona, gave notice that he would, on the 31st day of July, 1895, sell at public auction all the right, title, claim and interest of Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, in and to the property in controversy, and all the right, title and interest

which David W. Bouldin had at the time of his death therein. (Rec., p. 474.)

On July 31st, 1895, the Sheriff sold to Wilbur H. King for $2,000, and on January 16th, 1899, the then sheriff of Pima County conveyed (Rec., p. 515) to Wilbur H. King, "all the right, title, interest and claim which the said judgment debtor, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the 31st day of July, 1895, or at any time afterwards or now have" in and to the property in controversy.

On April 24th, 1907, Wilbur H. King conveyed to Joseph E. Wise all of his interest in the lands now in controversy by a quitclaim deed (Rec., p. 320) acknowledged on April p4th, 1907, duly recorded.

On April 8th, 1907, Mrs. A. M. Ireland, widow of John Ireland, conveyed to Joseph E. Wise all of her interest in the lands now in controversy by a quitclaim deed (Rec., p. 323) duly acknowledged and recorded.

During the year 1913, certain persons who claimed to be the descendants of an Antonio Baca, alleged to have been a son and heir of Luis Maria Baca, conveyed to Joseph E. Wise and Jesse H. Wise by quitclaim deeds, duly acknowledged and recorded, all their interest in the land in controversy. One-half of the one-nineteenth interest claimed to have been conveyed to Joseph E. Wise and Jesse H. Wise by these deeds is now vested in Margaret W. Wise.

On the 29th day of September 1914, the Superior

Court of the State of Arizona, in and for the County of Pima, issued an order (Rec., p. 524) directing John Nelson, Sheriff of Pima County, to execute, acknowledge and deliver to Joseph E. Wise a deed, as such sheriff, conveying to the said Wise "all of the property and all of the right, title and interest in and to the property so sold at the aforesaid sale by the said R. N. Leatherwood, as sheriff, under said judgment and decree of the said District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima." This order recited the deed from Lyman Wakefield as Sheriff of Pima County, to W. H. King on January 16, 1899, and recited that "by inadvertence or mistake the said deed only purported to convey the right, title and interest which the said Leo Goldschmidt, administrator of the estate of said David W. Bouldin, deceased, had at the date of sale and did not recite that the same conveyed the interest which had been attached, as aforesaid, and foreclosed as aforesaid under the said judgment of the said court, aforesaid."

On October 5, 1914, John Nelson, Sheriff of Pima County, Arizona, in accordance with the above order, executed and delivered to Joseph E. Wise, as the grantee and successor in interest of Wilbur H. King, a deed (Rec., p. 520) purporting to convey all of the right, title and interest of the said David W. Bouldin, as the same existed on the 14th day of March, 1893, in and to the land now in controversy. This deed has since been recorded in Santa Cruz County, Arizona.

No notice of an intention to apply for such an order

of the court was ever given to any of these defendants or any of their attorneys.

We believe that the foregoing is a complete and sufficient statement of all the facts which bear upon the title of the Bouldin defendants.

POINTS.

(1) The deeds of May 1, 1864, and May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts were signed by all the heirs of Luis Maria Baca and conveyed the entire title to the land in controversy.

(2) The Hawley deed was and is a valid and subsisting conveyance of the land in controversy.

(a) The deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts inured to the benefit of Christopher E. Hawley.

(b) If the above propositions be true, then the deed of November 19, 1892, from John C. Robinson to Powhatan W. Bouldin and James E. Bouldin was and is a valid and subsisting conveyance of the north half of the land in controversy.

(3) If the Hawley deed did not convey the title to the land in controversy, then the deed dated September 30, 1884, from the heirs of John S. Watts to David W. Bouldin was and is a valid and subsisting conveyance of the title to an undivided two-thirds interest therein.

(a) If the above proposition be true, then the title which was conveyed by that instrument to David W. Bouldin is now vested in these defendants.

(4) If the deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts did not inure to the benefit of Christopher E. Hawley, then the deed of September 30, 1884, from the heirs of John S. Watts to David W. Boudin was and is a valid and subsisting conveyance of an undivided two-thirds of all the interest in the land in controversy which was conveyed to John S. Watts by the heirs of Luis Maria Baca on May 30, 1871.

(5) No claim under adverse possession to any part of the land in controversy could be initiated prior to December 14, 1914.

ARGUMENT.

POINT 1.

(1) The deeds of May 1, 1864, and May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts were signed by all the heirs of Luis Maria Baca and conveyed the entire title to the land in conveyance.

The trial court decided that the above mentioned deeds only carried eighteenth-nineteenths of the entire title to the land in controversey, and further decided that Joseph E. Wise and Margaret W. Wise were entitled to the other one-nineteenth under deeds dated in 1913 from certain persons who claimed to be descendants of an Antonio Baca, alleged to have been a son and heir of Luis Maria Baca. This was the only portion of the decree from which the plaintiffs and these defendants appealed. The Santa Cruz Development Company also appealed from this portion of the decree, and since the interests of all three of these parties are the same in this phase of the case, joint briefs will be submitted by the plaintiffs, these defendants and the Santa Cruz Development Company, dealing with this point. Therefore, we will not attempt any discussion of it in this brief.

(2) The Hawley deed was and is a valid and subsisting conveyance of the land in controversy.

This is the first point to be decided by the court in this case, and if the court decides it in accordance with our

contention, and further decides that the confirmatory deed inured to the benefit of Hawley, the decision will render immaterial all questions as to the 1884 deed from the heirs of John S. Watts to David W. Bouldin, and all questions as to the force and effect of the sheriff's sale under the Ireland and King judgment, leaving only the question whether the claim of Joseph E. Wise and Margaret W. Wise to an undivided one-nineteenth of the land in controversy shall be sustained.

The primary rule for the construction of a deed is that it shall be construed according to the intention of the grantor. There are certain secondary rules of construction which may be resorted to by the court for the purpose of discovering the intent of the parties to a deed where that intent is doubtful, and we will discuss briefly these secondary rules before we enter upon a discussion of the primary rule.

Probably the most important of these rules is:

(1) A deed should always be construed to take effect rather than to fail.

Under this rule it must be held that the Hawley deed passed the title to the land now in controversy, otherwise the deed must fail to take effect, except as to some six or seven thousand acres in the northeast corner of the land in controversy, included within the metes and bounds of both the 1863 location and the attempted amended location of 1866.

(2) Falsa demonstratio non nocet cum de corpore constat. Applying this maxim, let us strike out the description by metes and bounds. The granting clause of the deed will then read "all that tract of land lying in the Santa Rita Mountains containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864 * * * The said tract of land being known as Location No. 3 of the Baca Series."

We do not think that any one can deny that this would be a plain and sufficient description of the land now in controversy.

(3) If a deed will admit of two constructions it should be construed most strongly against the grantor.

Salmon vs. Wilson, 41 Cal. 595.

Brown vs. State, 5 Colo. 496.

Field vs. Huston, 21 Me. (8 Shep.) 69.

Under this rule the land here in controversy would pass under the Hawley deed.

(4) Where a sufficiently certain reference is made in a deed to another instrument of record, reference may be had to that instrument in aid of the description contained in the deed.

Field vs. Huston, 21 Me. (8 Shep.) 69.

Ruppert vs. Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

In the Hawley deed John S. Watts described the land as having been conveyed to him by the heirs of Luis Maria Baca on May 1, 1864. Under the rule quoted above this is a sufficiently certain reference to permit of a reference to that deed in aid of the description in the Hawley deed. The deed of May 1, 1864, described the land by the metes and bounds of the original location of 1863, and that was the land which John S. Watts said in the Hawley deed that he was conveying.

(5) In the construction of a grant the court will take into consideration the circumstances attending the transaction,and the particular situation of the parties, the state of the country, and the thing granted at the time, in order to ascertain the intent of the parties.

Stanley vs. Green, 12 Cal. 148,

Grennan vs. McGregor, 78 Cal. 258,

Lane vs. Thompson, 43 N. H. 320.

At the time of the Hawley deed this property had never been surveyed. The relative locations of the 1863 and 1866 grant were not definitely known, and the parties to the deed supposed that the amended description of 1866 was the true description by metes and bounds of Baca Float No. 3.

All these secondary rules of construction point unerringly to the result for which we contend, and there are other canons to which we do not refer, because we do not consider them of sufficient importance to justify us in consuming the time of the court.

THE PRIMARY RULE.

We have already stated that the primary rule for the construction of deeds is that every deed must be construed according to the intention of the parties, and, applying this primary rule to the case at bar, we must hold that the above mentioned deed conveyed the land in controversy, because obviously Watts intended to sell and Hawley intended to buy the land which Watts had acquired from the heirs of Baca. Not only was that the intention of the parties, but the deed itself effectuates that intention. It is true that in so far as the deed describes the land by metes and bounds, it does not describe the land in controversy; but it is likewise true that the other descriptive portions of the deed accurately and completely describe the land in controversy, and according to a well-established rule for construing deeds, where descriptions conflict, we must reject the inaccurate, and accept the accurate description, if what would thus remain is a sufficient description. The deed purports to

> "remise, release and quit-claim unto said party of the second part (Christopher E. Hawley) and to his heirs and assigns forever, all that certain tract, piece or parcel of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning

at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains, and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links to the point or place of beginning. The said tract of land being known as location No. 3 of the Baca Series; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances; To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

Here we have three distinct and independent descriptions of the land intended to be conveyed. The first describes it as "situate in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first

part by deed dated the 1st of May, A. D. 1864"; the second as "Bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning"; and the third as "Location No. 3 of the Baca Series."

The first description, if standing alone, would be sufficient; the second description, if standing alone, would also be sufficient; and the third description, if standing alone, would be sufficient, because Baca Float No. 3 could be easily identified by inquiry at the general land office in Washington or at the local land office for the Territory of Arizona. The first description, however, is irreconcilable with the second description, and therefore one or the other must be rejected. The second description must be rejected under the rule which requires us to so construe a deed as to give it effect. To reject the first and leave the second description, would mean that Hawley took nothing under the deed from Watts, thus defeating the intention of the parties, giving to Watts $110,000 without any consideration, and withholding from Hawley the land for which he paid full value, and to which, therefore, he was fairly entitled.

Eliminating the description by metes and bounds, the descriptive part of the deed will read:

"All that certain tract, piece or parcel of land situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864 * * * The said tract of land being known as Location No. 3 of the Baca Series."

That the foregoing description is entirely sufficient to convey the land does not admit of any dispute, and concurring as it does with the obvious intention of the parties undoubtedly makes the deed executed by Watts to Hawley on January 8, 1870, a valid conveyance of this property.

The confusion in this case, and the resulting contention, arises out of the fact that in 1866 John S. Watts applied to the General Land Office for permission to amend the description of this land by changing the initial point, and his application was allowed. In accordance with this permission granted by the General Land Office, Watts made what is known as the amended location of 1866, which is described by metes and bounds as recited in the Hawley deed. The General Land Office permitted Watts to change the initial point upon the theory that he was merely making an amendment, and not attempting a substantial re-location of the Float. That view of the matter prevailed in the General Land Office until 1899, when a fuller presentation of the

question disclosed the fact that the change which Watts had made was, in effect, a new location, and therefore not authorized by the Act of June 21st, 1860, under which the heirs of Baca were permitted to select and locate certain lands.

With all the facts before him, the Secretary of the Interior decided—and we think it clear that the decision was a correct one—that the order made by the Commissioner of the General Land Office in 1866 allowing Watts to change the initial point was void, and that the claimants were remitted to the original location, as made in 1863. This decision of the Secretary of the Interior effaced the lines which Watts had attempted to establish in 1866 from the records of the United States and left the original location to stand as if the abortive attempt to change it in 1866 had never been made. There was not, therefore, in legal contemplation any amendment of the location of Baca Float No. 3 in 1866, and the action of the Interior Department in wiping out the lines which it had been attempted to establish, and remitting the claimants to the location of 1863, left, both in law and in equity, everything which had been done with respect to Baca Float No. 3 to relate to the location of 1863. To so hold simply means that Hawley obtained from Watts what Watts had obtained from the heirs of Baca; and to hold otherwise would mean that Watts obtained Hawley's money without rendering an equivalent for it.

Looking to the situation of the parties, and to the condition of the country at the time, it is perfectly plain that the real intention of Watts was to sell and the real inten-

tion of Hawley was to buy the land which Watts owned. Neither Watts nor Hawley had ever examined personally, or by his agents, the lands embraced either in the legal location of 1863 or the attempted location of 1866, and the essence of the transaction was the sale by the one and the purchase by the other of the land which Watts had acquired from the Baca heirs.

We have not gone into the questions raised by this point with as much detail and as many quotations from the authorities as might be possible, because the title of the plaintiffs depends upon their success in upholding the Hawley deed, and they have gone into the matter with a thoroughness and clearness which makes any extended discussion on our part too much of a repetition of their arguments.

THE PRENTICE CASES.

Counsel for Appellants rely upon the cases of Prentice vs. Stearns, 113 U. S. 435; and Prentice vs. Northern Pac. R. R. Co., 154 U. S. 163.

We confidently submit that a careful examination of these cases will disclose that they are not in anywise decisive of the question here before the court. In these cases the courts were unable to give effect to the maxim "Falsa demonstratio non nocet," for the reason that if the false description were disregarded no description of the land remained. Mr. Justice Mathews said in Prentice v. Stearns, supra, "The case is not one to which the maxim invoked for the construction of the deed can be applied. That rule of interpretation which rejects erroneous particulars of descriptions where what is left sufficiently identifies the subject of the grant, is adopted in aid of the intention of the grantor, as gathered from the instrument itself, read in the light of the circumstances in which it was written."

Mr. Justice Harlan, in Prentice v. Northern Pacific, supra, also held that the maxim could not be applied for the same reason. The deed there after first describing the land by metes and bounds, says: "And being the same land set off to the Indian Chief Buffalo," etc. The court held that these words were intended to describe generally what was first described specifically, and if otherwise sufficient could not be regarded as an independent description.

It is clear that there is a wide distinction between the Prentice deed and the Hawley deed. The Hawley deed has all of the elements which the Prentice deed lacked. By striking out the false description in the Hawley deed there remains a full and complete description of the land as it was finally surveyed. The grant in the Hawley deed is of the land "granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, 1864." Certainly, in any view of the case, this is a sufficient description to carry the title, for in the deed of May 1, 1864, to which reference is made, the land is described by the metes and bounds of the 1863 location. Instead of the general description being intended to describe the same land which the particular description gives, the particular description obviously is intended to describe more fully that land which has theretofore been granted by the general description, thus meeting the very criticism of the Supreme Court in the Prentice case.

Finally, we submit that no one can read the deed "in the light of the circumstances under which it was written," and have a doubt as to the intention of the grantor to convey Baca Float No. 3 wherever it should actually be ascertained to be upon the ground.

(a) The deed of May 30, 1871, from the heirs of Baca to John S. Watts inured to the benefit of Christopher E. Hawley.

On May 30, 1871, certain persons who covenanted

that they were all the heirs of Baca, made a deed to John S. Watts, whereby the said heirs ratified and confirmed the title made by them and by their "attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1864, for the lands described in * * * Location Number three situate in Arizona Territory, containing 99,289.39 acres, the boundaries of which are set forth and described in said deed," and wherein and whereby the "said heirs of the said Luis Maria Baca, dec'd * * * relinquish and quit-claim to said John S. Watts, his heirs and assigns all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described."

The Santa Cruz Development Company and Joseph E. Wise contend that this deed did not inure to the benefit of Christopher E. Hawley, and in support of their contention they say that the Hawley deed was a quitclaim deed, and that, therefore, the after-acquired title of Watts did not pass to his grantee, Hawley, under that alleged quitclaim deed.

To this contention there are three answers. Each in itself is sufficient. They are, briefly stated.

(1) The title conveyed to John S. Watts by the deed of May 30th, 1871, passed to Hawley by Section 33, Chapter 42, Howell's Code of Arizona, 1864; because the Hawley deed purported to convey the land in controversy in fee simple absolute.

(2) The Hawley deed was not a quitclaim deed.

(3) Even though the Hawley deed was a quitclaim deed, there is now no difference in efficacy and operative force between a quitclaim deed and a deed of bargain and sale.

We will deal with these answers to their contention in the order in which they are stated.

(1) The contention that all the title to the land in controversy which passed from the heirs of Baca to John S. Watts by the deed of May 30th, 1871, did not inure to the benefit of Christopher E. Hawley is abundantly answered by a reference to Section 33, Chapter 42, Howell's Code of Arizona, 1864, which reads as follows:

> "If any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

This provision was the law of Arizona at the time these two deeds were made.

In the case of Frink v. Darst, 14 Ill. (4th Peck) 304, 58 Am. Dec. 575, an Illinois Statute, almost identical in words with this statute, was under consideration by the court, and the court held that where the deed purported to convey the land itself, and not merely the grantor's

"right, title and interest" in the land, the statute would apply, and after-acquired title of the grantor would inure to his grantee. The deed under consideration in that case read "grant, sell and convey" * * * "all my right and interest in," etc. It will be seen that the word "quitclaim" nowhere appeared in this deed, the operative words of conveyance being "grant, sell and convey"; but the Supreme Court of Illinois held that the statute would not apply because the deed did not purport to convey the land itself, but only the "right, title and interest" of the grantor and was not, therefore, within the terms of the statute.

In Bogy v. Shoab, 13 Mo. 365, a provision in the Missouri statutes, almost identical with the provision quoted above, was construed by the Supreme Court of Missouri. That court reached a conclusion in exact accordance with our contention. The deed under consideration read "all right, title and interest," etc. of the grantor. The Court said that the statute did not apply to such a deed, because it was not a conveyance of the "fee simple absolute." The court then discussed the meaning of the words "fee simple absolute" and decided that they mean a conveyance of the land itself as distinguished from a conveyance of all the grantor's "right, title and interest" in the land. The Court held that the statute did not apply to the deed under consideration, because it only purported to convey the grantor's "right, title and interest." This case of Bogy v. Shoab, supra, was quoted with approval by the Supreme Court of Illinois in the case of Frink v. Darst, supra.

There is a similar provision in the statutes of South Dakota, and it was construed in the case of Tilton v. Flormann, 117 N. W. 377, the court holding in favor of the rule for which we contend.

(2) But independently of the provision of Howell's Code which we have discussed above, the title conveyed by the heirs of Baca to John S. Watts by their deed dated May 30, 1871, inured to the benefit of Christopher E. Hawley, because the Hawley deed was not a quitclaim deed.

The courts have held universally that where a deed conveys the land itself, and not merely the grantor's "right, title and interest" in the land, the deed is not a quitclaim, and that after-acquired title of the grantor will inure to the benefit of his grantee.

In Abernathy v. Stone, 81 Texas 430, a deed contained the words "have this day, do by these presents sell, alienate, convey and quitclaim unto said (grantee), his heirs and assigns forever, all and singular the following described tract of land (describing it), and containing 866 2-3 acres of land, and all right, title and interest which I have and devise to the above described tract of land by virtue of the survey aforesaid I sell, convey, and quitclaim to the said (grantee), from me and my heirs forever."

The Supreme Court of Texas says "the instrument was not, as we think, a quitclaim, but an absolute conveyance of the land itself as contradistinguished from a

transfer of the mere chance to or 'right, title and interest' in the land."

See also

Balch v. Arnold, 9 Wyoming 17, 59 Pac. 434.
Wightman v. Spofford, 56 Iowa 145, 8 N. W. 680.

Cummings v. Dearborn, 56 Vt. 441. (An excellent case, quoting from several others).

Garrett v. Christopher, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850.

Dycus v. Hart, 21 S. W. 229 (Texas).

Moore v. Swift, 67 S. W. 1065-1066 (Texas).

Kempner v. Beaumont Lumber Co., 49 S. W. 412 (Texas).

Prentice v. Duluth Storage & Forwarding Co., 58 Fed. 437.

Bennett v. Waller, 23 Ill. (13th Peck) 97, at page 184.

The courts have also held that if the operative words of a conveyance are "grant, bargain and sell," but the deed only purports to "grant, bargain and sell all the right, title and interest" of the grantor, the deed is a quit-claim.

Reynolds v. Shaver, 59 Ark. 209, 27 S. W. 78.

This case is interesting, and well illustrates our point, because it is the converse of it. The operative words of

the conveyance being "grant, bargain and sell" instead of "remise, release and quitclaim" as in the Hawley deed, and the instrument purporting to convey "all the right, title and interest" of the grantor, instead of the land itself, as is the case in the Hawley deed.

See also

Hilkowski v. McNellis, 107 N. W. 965, 98 Minn. 27.

In this case one of the parties agreed to convey land "by a good and sufficient quitclaim deed." The Supreme Court of Minnesota held that this agreement was sufficiently performed by a conveyance of all the grantor's "right, title and interest" in the land.

(3) The third answer to the contention of the Santa Cruz Development Company and Joseph E. Wise is found in the case of,

Moelle v. Sherwood, 148 U. S. 20.

In that case, the Supreme Court of the United States, speaking through Mr. Justice Field, say (page 29)

> "There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale."

A deed in the form of grant, bargain and sale is efficient and operative to convey an after-acquired title. If there be no difference in their efficacy and operative force between a deed of grant, bargain and sale and a

quitclaim, then a quitclaim deed must be efficient and operative to convey after-acquired title of the grantor. Therefore, even though the Hawley deed had been a quitclaim deed, under the decision in Moelle v. Sherwood, supra, after-acquired title of the grantor, Watts, would have inured to his grantee, Hawley.

This case was quoted and followed with approval by the United States Circuit Court of Appeals for the Eighth Circuit in

Rusk Land & Lumber Co. v. Wheeler, 189 Fed. 321.

(b) If the above propositions be true, then the deed of November 19, 1892, from John C. Robinson to Powhatan W. and James E. Bouldin was and is a valid and subsisting conveyance of the north half of the land in controversy.

At the trial in the court below the plaintiffs made no attack upon this deed in any way, and they did not appeal from the part of the decree which awarded these defendants their interest under this deed, and, therefore, if we concede that they obtained the title to the whole of the land in controversy by the Hawley deed, the confirmatory deed, and by mesne conveyances from Hawley to Robinson, then the deed from Robinson to James E. and Powhatan W. Bouldin is a good conveyance of the north half of the land here in controversy.

As we have just said, the plantiffs do not contend otherwise, and they are the only parties to this case who

have any interest whatever in that question, but we think it advisable for us to make some mention of the matter, because of the fact that at the trial in the court below the attorneys for the Santa Cruz Development Company and for Joseph E. Wise attempted to make an attack upon this deed on the ground that it was not a good conveyance of the north half of the land in controversy from Robinson to James E. and Powhatan W. Bouldin. We respectfully call the attention of the court to the fact that neither of these parties has any interest whatever in that question. Their title is adverse to the title which Robinson held, and is based upon the theory that the Hawley deed did not convey the land in controversy. They have nothing to do with the question of whether Robinson did or did not convey his title to James E. and Powhatan W. Bouldin, and upon what theory they think that they have a standing which permits them to make an attack upon that deed from Robinson to James E. and Powhatan W. Bouldin we are unable to imagine. The lower court at once overruled their contention, and we would not take up the time of the court with this matter, except that the attempt may be repeated in this court. We say again that the title of the Santa Cruz Development Company and of Joseph E. Wise is held in direct opposition to what is called the Robinson title, and that they have no interest of any nature whatever in the question of what Robinson conveyed to James E. and Powhatan W. Bouldin by his deed dated November 19th, 1892.

POINT NO. 3.

If the Hawley deed did not convey the title to the land in controversy, then the deed dated September 30, 1884, from the heirs of John S. Watts to David W. Bouldin was and is a valid and subsisting conveyance of the title to an undivided two-thirds interest therein.

This deed is a conveyance from the heirs of John S. Watts to David W. Bouldin of an undivided two-thirds interest in Baca Float No. 3, describing it by the original 1863 location. The deed is signed by John Watts for himself, and as attorney in fact, for the other heirs of John S. Watts. The defendant, Santa Cruz Development Company, raises several contentions with regard to this instrument. They contend first that John Watts did not have a proper power of attorney from the other heirs of John S. Watts to execute the deed. In John Watts's deposition, taken at Newton, Kansas, on October 27th, 1914, he stated specifically that he did have a power of attorney. (Rec., p. 285.) He further stated that in 1899, or some time prior thereto, James W. Vroom, President of the Santa Cruz Development Company, went through all of the papers in his possession regarding the Baca Float and took therefrom such as he wanted. He further testified (Rec., p. 295) that he turned those powers of attorney over to James W. Vroom, now President of the Santa Cruz Development Company.

The deed from the heirs of John S. Watts to David W. Bouldin was dated September 30, 1884, and is, there-

fore, an ancient instrument. Under the doctrine of ancient instruments proof of the power under which they were executed is not necessary. It will be presumed that the party executing them had the proper power of attorney.

Wigmore on Evidence—Vol. 3, Sect. 2144, and cases cited therein.

The Santa Cruz Development Company further contends that this instrument is not a conveyance, but an executory agreement. The rule is that the question as to whether any instrument is a conveyance or an executory agreement is one of intention to be determined from the instrument itself. If that intention be doubtful upon the face of the instrument, then surrounding circumstances may be looked to.

Williams v. Paine, 169 U. S. 55 (page 76).

Bortz v. Bortz, 48 Pa. St. 382.

We contend that this instrument on its face is plainly a conveyance. It begins with the words "This Indenture." The word "Indenture" applied to a written instrument imports in its broadest sense a conveyance.

Black's Law Dictionary, p. 616.

Whitney v. Richardson, 13 N. Y. Supp. 861, 862 (59 Han. 601).

Scott v. Mills, 10 N. Y. State Rep. 357-58.

So the parties start out by calling it a conveyance.

It contains words of present conveyance. The second paragraph of the deed reads as follows:

> "WITNESSETH, That the parties of the first part, for and in consideration of the sum of One Dollar to each and every one of them in hand paid, by the party of the second part, the receipt whereof is hereby by each and every one of them respectively acknowledged, and for the further consideration, covenants and agreements to be performed by the party of the second part, as hereinafter mentioned and for the purpose of compromising and settling the claims of title between the parties of the first and second part, and of perfecting and quieting the title to the lands hereinafter described, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns forever, all the undivided two-thirds (2-3) of all our right, title and interest of, in and to the following described tracts or parcels of land, o wit:"

The instrument contains words of heirship.

The sixth paragraph of the instrument contains this sentence:

> "It being understood and agreed that this is a quit-claim title and that the parties of the first part are not to be responsible to the party of the second part for the failure of title or any part thereof."

It seems to us that this plainly indicates that the par-

ties intended this instrument to be a conveyance.

The instrument is signed by two subscribing witnesses. Under the laws of Arizona in force at that time, a conveyance to be valid had either to be acknowledged by the grantor, or signed or acknowledged in the presence of, at least, two credible subscribing witnesses.

Furthermore, the parties to the instrument have settled all possible question as to what it is by calling it a conveyance in the body of the instrument. In the second sentence of page 277 of the record appear the words:

> "And the said David W. Bouldin, party of the second part, hereby covenants and agrees with the parties of the first part, in further consideration of this **conveyance** that he will," etc.

(a) If the above proposition be true, then the title which was conveyed by that instrument to David W. Bouldin is now vested in these defendants.

On March 13th, 1893, Ireland and King brought a suit against David W. Bouldin, in the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, on a note for $5,000. In their declaration (Rec., p. 456) filed on that day they set out that note in full. On the same day they sued out a writ of attachment (Rec., p. 465) addressed to the sheriff or any constable of the County of Pima and signed by the clerk of the above court, commanding the sheriff or constable to attach sufficient property of David W. Boul-

din which might be found in Pima County to make the sum of $5,000 with interest. This writ of attachment was levied upon all the interest which David W. Bouldin had on March 14, 1893, in and to the land in controversy.

In May, 1893, David W. Bouldin answered that suit (Rec., p. 466) setting up the title bond described in the note sued on, and contending that he was not liable on the note because Ireland and King could not convey to him a good title to the two-twenty-sevenths interest.

In December, 1893, David W. Bouldin died, and sometime thereafter Leo Goldschmdt was appointed by the court at Tucson as administrator of the estate of David W. Bouldin (Rec., p. 505) and was substituted as defendant in the case. (Rec., p. 498).

On the 2nd day of May, 1895, the court gave judgment (Rec., p. 468) against Leo Goldschmidt, as administrator of the estate of David W. Bouldin, for the sum of $8,550.00, with interest and costs, and ordered "that said amount be paid by said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased." The judgment of the court then continued as follows:

> "And it further appearing to the court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, Therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the Clerk of this Court, under the seal of this Court, directed to the Sheriff of the County of Pima, Territory of Arizona, directing him to sieze and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said David W. Bouldin in the above described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale.

Done in open court this 2nd day of May, 1895.

J. D. BETHUNE,

Judge."

We deny that the court had power to render the judgment that it did render. We claim that that portion of the judgment foreclosing the attachment and directing a sale of the property was wholly without the court's jurisdiction and therefore, as we shall hereafter point out, open to collateral attack.

In considering the question of the jurisdiction of the court we shall first examine the statutes of the Territory of Arizona in force at that time, to wit, Pars. 797, 799, 1117, 1119, 1121 and 176, Revised Statutes of 1887, which are as follows:

Par. 797. (Sec 149) Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions.

Par. 799. (Sec. 151) When a recovery of money is had against an executor, administrator or guardian, as such, the judgment shall state that it is to be paid in the due course of administration, and no execution shall issue. Such judgment shall not be a lien on the real property of a decedent.

Par. 1117. (Sec. 153) No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse

against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented.

Par. 1119. (Sec. 155) If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required.

Par. 1121. (Sec 157) A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be, that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment.

Par. 1176. (Sec 212) When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim

against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien, until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed, is affected by the statute of limitations pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the Court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs.

It will be observed that Par. 797, which contains the general provisions as to judgments for the foreclosure of mortgages or other liens, expressly excepts judgments

against executors, administrators and guardians, and that Par. 799 provides as to them: "the judgment shall state that it is to be paid in he due course of administration."

Par. 1117 prohibits maintaining any action upon a claim against an estate unless the claim is first presented to the executor or administrator, except that the holder of a mortgage or lien may maintain an action to enforce the same against the property of the estate subject thereto where all recourse against any other property of the estate is expressly waived in the complaint.

These provisions of the Statutes of 1887 were considered by the Supreme Court of Arizona in Wartman v. Pecka, 8 Ariz. 8, 68 Pac. 534.

In that case suit was brought upon a promissory note and on the same day an attachment was sued out and levied on real estate of the defendant. Thereafter the defendant died and an administrator was appointed. The plaintiff presented his claim to the administrator and it was rejected. The administrator was made a party to the suit and an amended complaint was filed but no waiver of recourse against other property of the estate was made in the amended complaint. A personal judgment was rendered, the trial court, however, holding that the attachment was dissolved by the death of the defendant.

The Supreme Court held that the death of the defendant did not dissolve the attachment but that there being

no waiver of recourse in the amended complaint plaintiff was not entitled to have the property sold under his judgment. It was held that the provisions of Par. 1117 embraced an action pending against a decedent at the time of his death, and that if the plaintiff in such action should amend his complaint waiving all recourse against any other property of the estate he could secure a foreclosure of his lien and have the property sold to satisfy it.

The court said:

> "If section 1117 is to be construed as embracing an action pending against the decedent at the time of his death it follows that before the plaintiff in any such action may enforce an attachment lien he must comply with the requirement as to an express waiver of all recourse against any other property of the estate. This he may do, if he so elects, by amending his complaint in that behalf. Should, however, the plaintiff present his claim to the executor or administrator for allowance or rejection, and make no waiver as required in Par. 1117, then we think there is still ample provision in other sections of the Probate Act, which save to him his attachment lien, to be enforced in due process of administration."

The court then quotes Par. 1176 of the Statutes, and orders that judgment be entered establishing the attachment lien on the real estate and directing that the judgment be paid in due course of administration of the es-

tate, and that the real estate attached shall be subject to the attachment lien until paid and satisfied out of the general funds of the estate, and if said general funds be insufficient, then out of the proceeds of sale of the real estate in the order of the priority of said lien.

The facts in this case come squarely within the decision of the Supreme Court of Arizona in the Wartman case. The facts are precisely the same except that in the Wartman case the plaintiff did file an amended complaint, while in this the plaintiff filed none. Both presented claims to the administrator; neither waived re course. Therefore the decision in the Wartman case is conclusive here.

The only jurisdiction then that the court had in this case was to render judgment against Goldschmidt as Administrator and to order the judgment paid in due course of administration, directing that the attachment lien be satisfied by payment from the general funds of the estate, or, if they be insufficient, to direct the administrator to sell the real estate attached to satisfy the lien of the attachment.

The judgment undertakes to direct that it be paid in due course of administration, and that the lien be foreclosed and the property sold. It is clear that the court had no jurisdiction to do both. The only manner in which the court could have acquired jurisdiction that would have enabled it to render a judgment directing the property to be sold was by the plaintiff filing an amended complaint in which he waived recourse to other prop-

erty. As no such amendment was filed, the order that the property be sold was wholly beyond the jurisdiction of the court.

It has been uniformly held that the construction of a state statute by the state court is binding on the Federal courts, and therefore this court is bound by the construction given to these statutes by the Supreme Court of Arizona in the case of Wartman vs. Pecka, supra. Under the authority of that case the judgment of the District Court of Pima County in the case of Ireland and King vs. Bouldin was beyond the jurisdiction of the court and therefore void.

The attorney for Joseph E. Wise contends that this judgment is safe from collateral attack, because he says that the court had jurisdiction of the parties and of the subject matter, and that therefore the judgment is safe from collateral attack. But conceding for the moment that the court did have jurisdiction of the parties and the subject matter, that is not all that is necessary to render the judgment safe from collateral attack. Judge Gilbert of this court, in Cohen vs. Portland Lodge No. 142, B. P. O. E., 140 Fed. 774, said:

> "A domestic judgment is conclusive against collateral attack only when the jurisdictional facts appear of record or when the court has expressly adjudged that they exist."

In Ritchey vs. Sayers, 100 Fed. 522, it is said:

> "But it may be claimed in this case that the court

had a full and complete jurisdiction of the case that may be conceded, but the question is, 'did it have jurisdiction to enter the particular decree or judgment thereon that it did enter?' As we have before seen, we reached the conclusion that the particular judgment could not be entered; and it is a well-settled principle that although a court may have jurisdiction of a case, yet if it appears on the record that it did not have jurisdiction to enter the decree and the particular judgment thereon that it did enter, then that decree and judgment may be collaterally impeached."

The Supreme Court of the United States has in several cases announced the doctrine that a court must have jurisdiction to enter the particular judgment that it did enter in order to render it invulnerable to collateral attack. These cases are reviewed and quoted from in Russell vs. Shurtleff, (Colorado) 65 Pac. 27. In that case the judgment under review was rendered in an action in which the prayer of the complaint was for a several judgment in proportion to the respective interests of the defendants in certain mining properties. The judgment rendered was joint, for the entire sum. The Supreme Court said that this was error and that the question was whether it rendered the judgment void or merely voidable.

The subject is discussed as follows:

"One of the essentials of a valid judgment is that the court pronouncing it must have jurisdiction to

render that particular judgment (Newman v. Bullock, 23 Colo. 217,, 47 Pac. 379; 12 Am. & Eng. Enc. Law, 1st Ed., 246); and, if it appears from the record of a judgment that the court in pronouncing it acted without jurisdiction, it is void (People v. District Court, 22 Colo. 422, 45 Pac. 402; Brown v. Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 228; Great West. Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. 90,, 23 Pac. 908). The distinction between void and voidable judgments is often refined, and difficult of solution. 'A judgment may be erroneous, and not void, and it may be erroneous because it is void.' Ex part Lange, 18 Wall 163, 21 L. Ed. 812, supra. There can be no doubt as stated in Newman v. Bullock, 'that the tendency of the later authorities, especially in the federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine, but also the power to render the particular judgment in the particular case.' This doctrine is based upon the proposition that, if a court is not invested with power to render a particular judgment, its attempt to do so is without its jurisdiction, and must not be confounded with the proposition that the rendition of an erroneous judgment within its power is but the erroneous exercise of its jurisdiction. With full jurisdiction to pronounce a judgment which would be binding upon the defendants and their property, the power and authority of the county court was

limited by definite, statutory provisions as to the character of relief which could be granted against defendants who had not answered. By directing a joint judgment when an individual one only was prayed for, the trial court transcended its authority and violated express statutory commands, for, although its jurisdiction attached to the parties a judgment not within the powers granted by the law of its organization is void. Ex parte Lange Supra; U. S. v. Walker, 109 U. S. 258, 3 Sup. Ct. 277, 27L. Ed. 927. U. S. v. Walker was an action by an administrator de bonis non on the bond of an administratrix to recover money received for assets of the estate collected by the latter and which by order of the court, in the settlement of her account as administratrix, she was directed to pay over to the administrator de bonis non. The law of the jurisdiction under which the administratrix acted provided that upon the removal of an administrator the court shall have authority to direct that assets of the deceased in his hands, which may remain unadministered, be delivered to the newly appointed administrator. The court concluded that this statute did not change the common-law rule to the effect that an administrator de bonis non derives his title from the deceased, and not from the former administrator; that to him is committed only the administration of the assets of the deceased which have not been administered; and, therefore, assets of the estate which

had been converted into money by the former administrator were funds to which he was not entitled. It was urged that the decree directing the administratrix to pay over these funds to her successor was conclusive in the suit upon her bond, for the reason that such decree could not be collaterally attacked. The supreme court held to the contrary, because, as stated, in effect, the court directing the decree exceeded its jurisdiction, in that its authority for making the order was limited to assets of the decedent in the hands of the administrator which were not administered upon. Bigelow v. Forrest, 9 Wall, 339, 19 L. Ed. 696, was an action of ejectment. Bigelow, who was defendant in the trial court, relied for title on a sale made under a decree of the United States District Court rendered in a proceeding for the confiscation of the premises sued for under the Act of July 17, 1862. This Act provided that the property of an officer of the army or navy of the Confederate government might be seized and sold, which proceedings should operate to divest the owner of the property so seized of any interest therein during his life. Under this Act a decree had been rendered which purported to direct a sale of the property in fee. The heir of the owner claimed that the decree was void in so far as it purported to direct an unconditional confiscation of the property in question. In the action of ejectment it was contended that this question could not be raised collaterally. The Supreme Court said: 'Doubtless, a

decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the Act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest:' and the court therefore held that so much of the decree of the court in which the confiscation proceedings were had as was in excess of its powers was void. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, is also a case where the question as to when a judgment may be collaterally attacked is considered. In that case it was said: 'The doctrine invoked by counsel that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition; but, like all general propositions, is subject to many qualifications in its application. * * * Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of judgments. It must act judicially in all things and cannot then transcend the power conferred by law * * * The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.' "

See also:

Noble v. Union River Logging R. Co. 147 U. S. 165

Sache v. Wallace, (Minn.) 112 N. W. 386.

Venner v. Denver Union Water Co., 63 Pac. 1061.

Jorgenson Co. v. Rapp, 157 Fed. 732.

Walkins Land Co. v. Mullen, 54 Pac. 923.

23 Cyc. 684, and cases cited.

12 Am. & Eng. Enc., 1st Ed., 246.

There would seem to be no question whatever under the statutes as construed by the Supreme Court of the State of Arizona, but that a waiver of recourse against other property of the estate is jurisdictional; that without such waiver the court has no power to order the sale of property of the estate by the sheriff, and that in this case the court had no power or jurisdiction to enter the particular judgment that it did render. And it seems equally clear from the authorities we have cited that the judgment ordering the sheriff to sell the property is void and open to collateral attack.

But there is a further reason why we may attack that judgment collaterally, and this same reason applies to all the proceedings in that suit. Wilbur H. King, the plaintiff in that case, was the purchaser at the Sheriff's sale, and Joseph E. Wise, who now claims title through that sale, holds by a quitclaim deed from King. The rule is

universal that where the judgment creditor purchases at a sheriff's sale, he is not a bona fide purchaser for value

In Branck v. Foust, 30 N. E. 631, 130 Ind. 538, the court says:

> "While we feel we are not required to decide the question here, we do not wish to be understood as affirming or intimating that a sheriff's sale may not be attacked collaterally, where, as in the case at bar, the purchaser is the execution plaintiff. The authorities are uniform in holding that he is chargeable with notice of all irregularities in the sale."

Citing.

Meredith v. Chancey ,59 Ind. 466-469.

Harrison v. Doe, 2 Blackford 1.

Hamilton v. Burch, 28 Ind. 233-235.

Piel v. Brayer, 30 Ind. 332-339.

Keen v. Preston, 24 Ind. 395-398.

Carnahan v. Yorkes, 87 Ind. 62.

Richey v. Merritt, 108 Ind. 347, 9 N. E. 368.

See also

Lightfoot v. Horst, 122 S. W. 606 (Texas 1909).

Henderson v. Rushing, 105 S. W. 840.

American Savings Bank & Trust Co. v. Helgesen, 122 Pac. 27 (Wash.)

The same rule applies to the assignee of an execution plaintiff.

Spears v. Weddington, 142 S. W. 679 (Ky.)

Richey v. Merritt, 9 N. E. 368, 108 Ind. 347.

The reason for this rule is plain. The execution plaintiff has actual notice of all the proceedings in the case. He is interested in it from the start and is familiar with all the procedings. Furthermore, he pays no real consideration; he merely credits the amount of his bid on his judgment. He is not a purchaser for value.

Under that judgment of the District Court of Pima County, R. N. Leatherwood, sheriff of Pima County, on July 8th, 1895, published a Notice of Sale. (Record, page 474.) This Notice of Sale reads as follows:

"NOTICE OF SHERIFF'S SALE.

John Ireland and Wilbur H. King,
Plaintiffs,

—vs—

Leo Goldschmidt, Administrator
of the Estate of David W. Bouldin,
deceased,
Defendant.

Under and by virtue of an execution and order of sale issued out of the District Court of the First

Judicial District of the Territory of Arizona, in and for the County of Pima, on the 3rd day of July, A. D. 1895, and to me as Sheriff duly directed and delivered, on a judgment rendered in said court, in the above entitled action, on the 2d day of May, A. D. 1895, for the sum of eight thousand five hundred and eighty-four dollars and forty-five cents ($8584.45) with interest thereon at the rate of ten per cent per annum until paid, together with the foreclosure of plaintiff's attachment lien upon the following described property in Pima County, Territory of Arizona,upon which I have duly seized and levied and in said order of sale described as Location Number Three, being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the 6th Section of an Act of Congress of the United States, approved June 21st. 1860, entitled "An act to confirm certain Private Land Claims in New Mexico," and found in volume twelve, page 72, of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana county, New Mexico, beginning at a point one mile and one-half from the Salero Mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point, west twelve miles, thirty-six chains and thirty-four links; thence south twelve miles, thirty-six chains and thirty-four links, thence east twelve miles, thirty-six chains and thirty-four

links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, and containing ninety-nine thousand two hundred and eighty-nine acres and 39-100 of an acre, more or less; as said attachment lien existed on the 14th day of March, A. D. 1893.

Public notice is hereby given that I will at the court house door of the said County of Pima, at the hour of ten o'clock a. m., on Wednesday, the 31st day of July, A. D. 1895, sell at public auction to the highest and best bidder for cash, in lawful money of the United States, all the right, title, claim and interest both legal and equitable of the above named defendant in, of and to the above described property and all the right, title and interest both legal and equitable which said David W. Bouldin, deceased, had at the time of his death, in, of and to the above described property, or so much of said property as may be necessary to satisfy said judgment and costs of suit and all accruing costs.

Dated July 8, 1895.

R. N. LEATHERWOOD,
Sheriff."

It will at once be seen that this Notice of Sale does not conform to the judgment of the court. It gives notice that on July 31st, 1895, the sheriff of Pima County will sell to the highest bidder, for cash, the interest of "the above named defendant" and the interest which David W. Bouldin, deceased, had at the time of his death. "The

above named defendant" referred to in the notice was Leo Goldschmidt, administrator of the estate of David W. Bouldin.

There is no notice given that the sheriff will sell the interest which had been attached on March 14th, 1893, wnich was the interest he was ordered to sell by the judgment of the court.

The next step in the proceedings was the sheriff's Certificate of Sale (Rec., p. 513). This certificate reads as follows:

"Office of the Sheriff,

County of Pima, ss:

I hereby certify that I received the annexed Order of Sale at 5:30 P. M. on the 3rd day of July, 1895. And under and by virtue of said Order of Sale, I did on the 5th day of July, 1895, levy upon all the right, title, claim and interest of the within named defendant, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, in and to the following described real property lying, being and situate in the County of Pima, Arizona Territory, to wit: Location number three (3) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an Act of Congress of the United States approved June 21st, 1860, entitled, "An act to confirm certain private land claims in New Mexico,"

and found in volume Twelve, page 72, of the United States Statute at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Merico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degres east of the highest point of said mountain, run ning thence from beginning point west twelve miles thirty-six chains and thirty-four links, thence south twelve miles thirty-six chains and thirty-four links, thence east twelve miles thirty-six chains and thirty-four links, thence east twelve miles thirty-six chains and thirty-four links, thence north twelve miles thirty-six chains and thirty-four links to the place of beginning, containing ninety-nine thousand and two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale by posting notices of said sale in three public places, one of which was at the court house door.

And also by advertising in the "Citizen," a daily newspaper of general circulation published in the City of Tucson, Pima County, Arizona Territory, a copy of which is hereto attached, from the 8th day of July, 1895, until the 31st day of July, 1895, daily and successively. And I further certify that I did attend at the hour, time and place advertised for said sale and offered for sale a part of said property

for sale and received no bid. I then offered two parts of said property for sale and received no bid. I then offered three parts of said property for sale and received no bid, then I offered the whole of said property for sale and received a bid of two thousand dollars ($2,000), that being the highest and best bid offered in lawful money of the United States, the said property was sold to Wilbur H. King.

R. N. LEATHERWOOD,
By W. H. Tyler, D. S." Sheriff.

The "said property" mentioned in this Certificate of Sale was "all the right, title, claim and interest of the within named defendant, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased" in and to the land in controversy in the case at bar. This Certificate of Sale is the only evidence which we have of what was actually sold, and it shows that the sheriff sold the interest of Leo Goldschmidt, administrator of the estate of David W. Bouldin, and not the interest which he had been ordered to sell, namely: the interest attached on March 14th, 1893.

A sheriff, in making a sale of land is acting under a purely statutory authority, and all his acts in making the sale must be strictly in compliance with the order of the court and the requirements of the statute, or they will be void and of no effect. The sheriff of Pima County was ordered to sell all the interest which David W. Bouldin had in the land in controversy on March 14th,

1893. He sold the interest which Leo Goldschmidt, administrator, of the estate of David W. Bouldin, had on July 31st, 1895, and therefore, since he acted entirely wtihout authority in making the sale which he did make, the sale was void and passed no title whatever to the purchaser.

No redemption was made from this sale and on January 16th, 1899, Lyman W. Wakefield, sheriff of Pima County, executed and delivered a deed (Rec., p. 515) to Wilbur H. King, the purchaser at the sheriff's sale. This deed attempts to recite the previous proceedings in the case; but it recites them incorrectly from beginning to end, even to the time of day at which the sale was made. The granting part of this deed reads as follows:

> "has granted, bargained, sold and conveyed and confirmed and by these presents does grant, bargain, sell, convey and confirm unto Wilbur H. King, one of the said parties of the second part, and his heirs and assigns forever all the right, title, interest and claim which the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the said thirty-first day of July, 1895, or at any time afterwards or now have in and to all that certain lot, piece or parcel of land situated, lying and being in the said County of Pima, Territory of Arizona, and bounded and particularly decribed as follows, to-wit:"

then follows a description of the land in controversy in the case at bar.

It will be seen that this deed only purports to convey the interest "which the said judgment debtor, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the 31st day of July 1895, or at any time afterwards" in and to the land in controversy. This deed was absolutely void and carried no title whatever to Wilbur H. King for the same reasons given in connection with the Certificate of Sheriff's Sale. It did not convey the attached interest which the court had ordered sold. And the attached interest was the only interest which the sheriff of Pima County had any authority to sell or convey.

Whiting vs. Hadley, 85 Mass. (3 Allen) 357.

"The deed and its recitals not being in accordance with the levy and actual sale on the execution, no legal title was vested in the purchaser."

Bailey vs. Block, (Tex.) 134 S. W. 323,

Ware vs. Johnson, 66 Mo. 662,

Landreaux vs. Foley, 13 La. Ann. 114,

Waters vs. Duvall, 11 Gill & Johnson, 37, 33 Am. Dec. 693.

On April 24th, 1907, Wilbur H. King conveyed by quitclaim deed all his interest in the land in controversy in the case at bar to Joseph E. Wise.

The case now before the court was commenced by the filing of the plaintiff's bill in the United States District Court at Tucson, Arizona, on June 23rd, 1914. In due time thereafter, Joseph E. Wise filed an answer to that bill, claiming title to a large interest in the land under the sheriff's sale which we have described above.

After filing his answer in the case doubt seems to have arisen in his mind as to the validity of the sheriff's deed to Wilbur H. King, and as a matter of fact counsel for Joseph E. Wise practically concedes in his brief that the deed was invalid and carried no title, by making no attempt whatever to sustain it and relying entirely upon his subsequent deed.

On September 30th, 1914, the attorney for Joseph E. Wise appeared in the Superior Court of Pima County and obtained the order of that court which appears in the record at page 489. We do not deem extended comment necessary upon that proceeding. It was done purely ex parte and without notice, actual or constructive, to Leo Goldschmidt, administrator of David W. Bouldin, or the Bouldin defendants, though their Tucson attorney had an office almost adjoining the office of the attorney for Joseph E. Wise.

A sheriff's deed cannot be made in this fashion fifteen years after the delivery of the original deed without notice to the parties interested.

Blodgett vs. Perry, 97 Mo. 263, 10 S. W. 89.

A reading of this case we think will satisfy the court on this point.

Furthermore, the Revised Statutes of Arizona, 1901, provided that no judgment could be enforced or carried into effect after a lapse of five years from the rendition thereof without a hearing and notice to the parties interested.

Paragraph 2562 reads as follows:

> "The judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by application to and leave of the court, and upon a hearing had thereof, notice being given thereon to the parties interested in manner as may be directed by the court or judge at the time of application."

This action of Joseph E. Wise in 1914 was, of course, an attempt to enforce the judgment of the District Court of Pima County rendered on May 2nd, 1895, and since the attempt to enforce that judgment was made almost nineteen years after the judgment was rendered, notice and hearing were undoubtedly required by that paragraph of the statute.

The deed dated October 5, 1914, from the sheriff of Pima County was void for the further reason that the sheriff of Pima County has no power to convey land beyond the limits of Pima County.

Hanby vs. Tucker, 23 Ga., 132.

At the time of this conveyance in 1914, the land in controversy was located in Santa Cruz County.

There are many other minor points in connection with this Ireland and King's sheriff's sale which we might discuss, and there are other objections to it which we think might be sustained. For instance, all the proceedings are against Leo Goldschmidt, administrator of the estate of David W. Bouldin, and not against Leo Goldschmidt, **as** administrator. The words, "administrator of the estate of David W. Bouldin" are merely descriptio personae and do not imply that the proceedings were against him in his official capacity as administrator. But we think we have sufficiently demonstrated the entire invalidity of all these proceedings, and we will not extend this discussion further.

David W. Bouldin died intestate in December, 1893, leaving as his only heirs at law his two sons, James E., and P. W. Bouldin, who inherited his estate share and share alike. The interest which they obtained as the heirs of David W. Bouldin is now vested in these defendants. James E. Bouldin has since conveyed his interest to Jennie N. Bouldin, by deed, (Record, page 431), duly acknowledged and recorded. P. W. Bouldin has also conveyed his interest to the defendants, David W. Bouldin, Jr., and Helen L. Bouldin. This latter deed is not in the record. We did not introduce it in evidence because the lower court had already ruled on the Hawley deed and the confirmatory deed when we put in our case, and therefore our entire chain of title under the deed dated September 30th, 1884, from the heirs of John S. Watts to David W. Bouldin had become immaterial.

In the event, however, that this court reaches the conclusion that this sheriff's sale which we have discussed, did convey some title to the land in controversy to Wilbur H. King, and from him to Joseph E. Wise, then we respectfully ask this court to reverse and remand this case for further proceedings.

As we have said before, the trial court ruled on the effect of the Hawley deed and the confirmatory deed during the trial of the case and we did not put in our evidence under the chain of title which begins with the deed from the heirs of John S. Watts to David W. Bouldin on September 30th, 1884. The rule in Arizona is that a purchaser at a sheriff's sale takes the property purchased subject to all outstanding equities and trusts of which he had knowledge at the time he purchased.

Luke vs. Smith, 13 Ariz., 155, 108 Pac. 494.

We have evidence in our possession which we think shows conclusively that Wilbur H. King had knowledge of a trust in this property in favor of these defendants at the time he purchased the property, but owing to the action of the court in ruling at the trial on the effect of the Hawley deed and the confirmatory deed all our evidence under the chain of title which we are now discussing became immaterial, and we did not introduce it.

(4) If the deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts did not inure to the benefit of Christopher E. Hawley, then the deed of September 30, 1884, from the heirs of John S. Watts to

David W. Bouldin was and is a valid and subsisting conveyance of an undivided two-thirds of all the interest in the land in controversy which was conveyed to John S. Watts by the heirs of Luis Maria Baca on May 30, 1871.

A discussion of this point only becomes of importance in the event that the court decides that the Hawley deed conveyed the property in controversy and then decides that the confirmatory deed did not inure to the benefit of Hawley. In that event, these defendants claim that an undivided two-thirds of whatever title passed to Watts by the confirmatory deed is now vested in them by virtue of the deed of September 30, 1884, from the heirs of John S. Watts to David W. Bouldin. The argument in connection with that deed of September 30, 1884, and in connection with the Ireland-King Sheriff's sale, has been set out in extenso elsewhere in this brief and will not be repeated here.

(5) No claim under adverse possession to any part of the land in controversy could be initiated prior to December 14, 1914.

Until the land in controversy was segregated from the public domain no rights by adverse possession could be initiated against the Grant claimants, Wilson Cypress Company vs. Del Pozo y Marcos, 236 U. S., 635. Crittenden Cattle Company vs. Ainsa, 14 Ariz. 306, 127 Pac. 733.

The decree of the Supreme Court of the United States in the case of Lane v. Watts ordered, among other things,

"that the defendants Franklin K. Lane, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, and each of them and their successors in office, and all persons claiming to act under the authority or control of either of them be, and they are hereby required forthwith to place on file as muniment of the title which passed to the heirs of said Baca aforesaid, and for future reference as required by law, the field notes and plat of survey, made by Philip Contzen, under contract No. 136, dated June 17, 1905, for the purpose of defining the outboundaries of said land and segregating the same from the public lands of the United States." (Rec., p. 410).

This survey was filed pursuant to the mandate of the Supreme Court of the United States on December 14th, 1914, and the land then became segregated from the public domain.

Respectfully submitted,

JOSEPH W. BAILEY,
JOHN H. CAMPBELL,
WELDON M. BAILEY,
Attorneys for Defendants and Appellees Bouldin.

No. 2719

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SANTA CRUZ DEVELOPMENT COMPANY,
Appellant,

Against

CORNELIUS C. WATTS et al.,
Appellees.

SUPPLEMENTAL BRIEF IN BEHALF OF SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT.

G. H. Brevillier,
Counsel for Santa Cruz Development Company.

Pernau Publishing Company

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IN THE

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SANTA CRUZ DEVELOPMENT COMPANY,
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Appellees.

SUPPLEMENTAL BRIEF IN BEHALF OF SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT.

The purpose of this brief is to furnish the Court with references to decisions bearing upon the claims of Joseph E. Wise and Lucia J. Wise to a prescriptive title to certain small parts of the tract at bar; and also to answer the Bouldin brief which we did not receive until late in the afternoon of February 5, 1916.

No adverse possession by defendants Wise.

For nearly ten years last past, Mr. Wise has claimed an undivided interest in the whole tract as a tenant in common. Consequently his actual

possession could not be adverse. During that time, his wife, Lucia J. Wise, has lived with him upon part of the land to which a prescriptive title is claimed. Certainly her possession cannot be considered as adverse to her husband who claimed to be a tenant in common.

When limitation starts.

On pages 1 to 7 and on page 13 of our Reply Brief, we discussed the function of the survey and the necessity of it to the grant owners in order that they might take possession of the tract at bar and maintain ejectment against trespassers. Now we need only point out when the survey became official and actually segregated the tract from the public domain.

Since the modification of the Land Department rules in 1879, no survey is complete until the Commissioner of the General Land Office accepts it and orders it filed.

Maguire v. Tyler, 1 Black 195, 201, 202
Knight v. Land Ass'n, 142 U. S. 161, 179
Tubbs v. Wilhoit, 138 U. S. 134, 144
Clearwater Timber Co. v. Shoshone County, 155 Fed. 612, 631

This is true even where a special statute empowers the Surveyor General to make and approve the survey.

Castro v. Hendricks, 23 How. 438, 442, 443

The Commissioner's approval can be shown by his direction that the survey be filed.

Tubbs v. Wilhoit, 138 U. S. 134, 144, 145

In the case at bar, the Commissioner on December 14, 1914, filed the plat of survey and thereby approved it; he also transmitted a duplicate plat to the local land offices for filing therein. Consequently no limitation statute for a possessory title could commence to run until that date.

Reply to Bouldin brief.

At the middle of page 42 of that brief, the statement is made that the commencement of the Bouldin paper with the words "This Indenture" denominates it as a conveyance. If any answer be needed, the attention of the Court is called to the following cases wherein the instrument began with the same words, but the instrument nevertheless was held to be an executory contract.

Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415

Mineral Dev. Co. v. James, 34 S. E. 37; 97 Va. 403

Dreisbach v. Serfass, 17 Atl. 513; 126 Pa. 32

Then there follows in the Bouldin brief a statement that the expression in the Bouldin paper, "in further consideration of this conveyance", indicates that a conveyance was intended. Of course there are absolute conveyances and conditional conveyances, present conveyances and future conveyances. The best

answer, however, to the Bouldin contention is to refer the Court to cases where similar or even stronger expressions were used, and the instrument nevertheless held to be an executory contract on its face.

Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665

The Court will note that the Bouldin paper was executed in El Paso or Santa Fe (probably in the former place because of the subsequent proof there by a subscribing witness); and that a large percentage of the cases, wherein instruments containing the phraseology of a present conveyance have been held to be executory contracts, were decided by the courts of Texas or other southwestern states, and by the United States Supreme Court in affirming appeals from New Mexico and Arizona.

Respectfully submitted,

G. H. Brevillier,

Counsel for Santa Cruz Development Company.

(Copies of this brief are being mailed to all the attorneys in the case.)

No. 2719

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

vs.

CORNELIUS C. WATTS, and DABNEY C. T. DAVIS, JR., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN, and HELEN LEE BOULDIN,
Appellees,

and

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appelles,

and

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

and

SANTA CRUZ DEVELOPMENT COMPANY, a corporation,
Appellant,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOSEPH E. WISE, MARGARET W. WISE, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
Appellees.

Petition for Rehearing

OF JOSEPH E. WISE AND LUCIA J. WISE, APPELLANTS.

No. 2719

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

vs.

CORNELIUS C. WATTS, and DABNEY C. T. DAVIS, JR., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN, and HELEN LEE BOULDIN, Appellees,

and

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR., Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appelles,

and

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN, Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

and

SANTA CRUZ DEVELOPMENT COMPANY, a corporation, Appellant,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOSEPH E. WISE, MARGARET W. WISE, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN, Appellees.

Petition for Rehearing

OF JOSEPH E. WISE AND LUCIA J. WISE, APPELLANTS.

Now comes Joseph E. Wise and Lucia J. Wise, appellants, and file this their Petition for Rehearing herein, and ask the Court to grant such rehearing, upon the following grounds and for the following reasons, to-wit:

That one of the important questions in this case, duly raised by assignment of error and argued in our briefs, was whether or not a title by adverse possession or prescription, to a definite tract of 160 acres, and a patented millsite of five acres, fenced, occupied and claimed adversely by Joseph E. Wise for more than twenty years prior to the commencement of this action, and a certain definite tract of forty acres, fenced, occupied and claimed adversely by Mary E. Sykes from the year 1900 until her death, and thereafter by her daughter, Lucia J. Wise, both of said tracts being within the limits of the larger tract called Baca Float No. 3, vested in each of said Wises respectively such title under the Statute of Limitations of the State of Arizona, as to defeat the action of plaintiffs, Watts and Davis, and the Bouldins, so far as these three tracts of land are concerned.

If title by adverse possession to a specific small and definite piece of land, within the limits of Baca Float No. 3, can be obtained by anyone, by reason of the Statute of Limitations of Arizona, applying to Baca Float No. 3, as it does to all other private lands in the state, then, under the undisputed facts in evidence in this case, Joseph E. Wise has a valid title by prescription or adverse possession, to the 160-acre tract described in his answer, and to the 5-acre patented millsite; and Lucia J. Wise has a valid title by prescription or adverse possession, to the 40-acre tract described in her answer, and the decision of this Honorable Court, to that extent, should be modified.

This Court, in its decision in this case, has not considered at all this vital question. And without considering this question, in the opinion written by the Court, (an opinion which we, although defeated, recognize as most able and thorough as to the questions which are treated therein) this Court renders its decree, the effect of which is to adjudicate that Joseph E. Wise has no title by adverse possession to this 160-acre tract and 5-acre millsite, and that Lucia J. Wise has no title by adverse possession to the 40-acre tract inherited from her mother, Mary E. Sykes.

The importance of this question, and the urgent necessity for its determination by the Court in the present appeal, will be more manifest when we state to the Court that Watts and Davis and the Bouldins, as the owners of Baca Float No. 3, have recently filed with the United States District Court of Arizona, their suits in ejectment, to recover from Joseph E. Wise the possession of the 160-acre tract and 5-acre millsite occupied by him, and to recover possession from Lucia J. Wise of the 40-acre tract occupied by her.

The only defense to these suits in ejectment is the defense of adverse possession, for such a period of time as to ripen into a title. This defense cannot be made by the Wises in the ejectment suits, because the decree of this Court in the present case, is *res adjudicata* upon that defense, as well as any other defense that either of the Wises could have made.

In the ejectment suits just mentioned are numerous other defendants who are not parties in any way to the present case on appeal. The decree of the Court in the case at bar in no way is *res adjudicata* as to them. They can and will each assert, as to the particular tracts occupied by each, title by adverse pos-

session and prescription; their only defense and only title is the Statute of Limitations of Arizona.

If this Court does not, in the present case on appeal, pass upon or decide the question as to whether or not the Statute of Limitations is a good defense, as against the owners of Baca Float No. 3, then that question, as a matter of law, is left open, and this Court may hereafter, upon writ of error in the ejectment suits, decide that the Statute of Limitations is a good defense, and that title by adverse possession can be obtained as against the owners of the Baca Float No. 3. This will give title to all the defendants in the ejectment suits who prove such adverse possession—all but Joseph E. Wise and Lucia J. Wise, who are barred and estopped from making such defense by virtue of the decree in the present case.

And in the present case, wherein this decree is rendered against them, this Honorable Court has not even considered that defense.

Although the 160-acre tract so claimed by adverse possession by Joseph E. Wise is very small compared to the entire area of the Baca Float No. 3, nevertheless, it is a valuable piece of land; Wise has occupied it and lived upon it and claimed it since 1889; he has built his home upon it; he has spent thousands of dollars upon it; he has raised his family upon it, and this piece of land is now worth, with the improvements, many thousands of dollars; far in excess of the sum of $10,000.

Again, the 40-acre tract claimed by Lucia J. Wise, as heir and executor of her mother, Mary E. Sykes, although small in comparison to the nearly 100,000 acres of the entire tract, nevertheless, is very valuable. There is a two-story brick dwelling upon it, which alone cost more than $30,000; there are other build-

ings and improvements and this property was occupied and was the home of Mary E. Sykes for more than ten years prior to her death in 1912, and since then has been occupied, claimed and possessed by her heir, executrix and daughter, Lucia J. Wise. The only title claimed to this piece of land is by virtue of adverse possession, and adverse possession only.

As this is a suit brought by the plaintiffs, Watts and Davis, to quiet their title to the Baca Float, as against Joseph E. Wise, owner of the 160-acre tract mentioned, and against Lucia J. Wise, owner individually and as executrix of the 40-acre tract mentioned, the decree in this case, quieting the title of plaintiffs and the Bouldins in effect adjudicates that neither of the Wises has any title to these two tracts of land.

But this Court has not considered the question upon which such a decision must be based, namely, whether or not a title by adverse possession can be obtained against the owners of Baca Float No. 3.

The description of said 160-acre tract and said 40-acre tract, in accordance with the public surveys, that is by quarter section, township and range, is accurate and definite, for long prior to 1899 the government extended the public surveys over the tract described in the 1863 location, as will be seen by reference to the official map of Pima County, in evidence in the case, as well as other maps; and that these two tracts are within the exterior lines of Baca Float No. 3, according to the Contzen survey thereof, is conceded by all the parties to this action; as well as the fact that the description thereof, according to the public surveys is definite and certain.

For the convenience of the Court we will briefly refer to the record on appeal herein to show that in the pleadings, the evidence taken upon the trial, the

rulings of the Court thereon, and our exceptions thereto and in our assignments of error, also in our brief, this defense, as to those specific tracts of land, has been urged in every way upon the attention of the Court, and we, therefore, are entitled to a decision thereon.

Allegation of title to the 160-acre tract and 40-acre tract by adverse possession is alleged as matter of defense in the answer filed by Joseph E. Wise and Lucia J. Wise.

In paragraph 36 of the answer of the Wises in this case, the defense of title by adverse possession of Joseph E. Wise to certain tracts is alleged as follows:

> "The defendant, Joseph E. Wise, further avers that for eighteen years prior to his obtaining his deeds from the said Wilbur H. King and Mrs. A. M. Ireland, and at the time that he obtained the first of said deeds, he had been continuously, to-wit, from the year 1889 down to the time he obtained the first of said deeds, in peaceable and adverse possession of the following tracts of land, situate within the limits of the said Baca Float No. 3, according to the valid location thereof, to-wit: The east half (½) of the northwest one-fourth (¼) and the west half (½) of the northeast one-fourth (¼) and the west half (½) of the northwest one-fourth (¼) of section 35, township 22 S., of Range 13 E., G. & S. R. B. & M., and containing 340 acres; also Sec. 36 in the said township 22 S. of R. 13 E., containing 640 acres, cultivating, using and enjoying the same during all of said times; and at the time that he obtained his said deeds from said Ireland and King, aforesaid, he claimed to be the owner of said lands and premises aforesaid, under and by virtue of his adverse possession; and that said adverse possession had ripened into a title under the statute of limitations of the then Territory, now State of

Arizona, at the time he acquired his said deeds from said Ireland and King, and that ever since said date he has claimed and does now claim to be the sole owner of all of the said tracts of land, herein just above described; and he further avers that plaintiff's action or cause of action for the tracts of land aforesaid, is barred by the statute of limitations."

Transcript of Record, pp. 77-78.

And the defense of Lucia J. Wise as to her title by adverse possession of the 40-acre tract above mentioned, is thus set forth in said answer, to-wit:

"And the defendant Lucia J. Wise does allege that she is a daughter of Mary E. Sykes; that said Mary E. Sykes died on or about the 11th day of May, 1911; that the said Mary E. Sykes, at the date of her death, was in possession and for a continuous period of more than 10 years prior to her death, had been in the peaceable and adverse possession of the following tract of land, situate within the limits of the said Baca Float No. 3, and within the limits of the lands claimed by plaintiffs, to-wit: The northwest quarter (¼) of section one (1), township twenty-three (23) south, of range thirteen (13) east, Gila and Salt River Base and Meridian, cultivating, using and enjoying the same; and that this defendant, Lucia J. Wise, as one of the heirs of the said Mary E. Sykes, and as executrix of the will of the said Mary E. Sykes, and as successor in interest to the said Mary E. Sykes, ever since the death of the said Mary E. Sykes as aforesaid, has been in the peaceable and adverse possession of the said tract of land just above described, cultivating, using and enjoying the same; and that the plaintiff's cause of action as against the defendant Lucia J. Wise as to the said tract of land just described is barred by the Statute of Limitations of the State of Arizona, and is barred by the provisions of

section 698 of the Revised Statutes of Arizona of 1913."

Transcript of Record, pp. 78-79.

And in the prayer of said answer the said Joseph E. Wise prays that he be decreed to be the owner of his specific tracts, and Lucia J. Wise prays that she be decreed to be the owner of her specific tract, the prayer of the answer in this regard being as follows:

"3. That the defendant Joseph E. Wise be decreed to be the owner of all the following pieces of land situate within the limits of said Baca Float No. 3 aforesaid, to-wit: The east half of the northwest quarter, the west half of the northeast quarter, and the west half of the northwest quarter of section thirty-five and all of section thirty-six in township twenty-two south of Range 13 East, G. & S. R. B. & M., and that his title thereto be quieted.

"4. That the defendant Lucia J. Wise be decreed to be the owner of all of the following tract of land situate within the limits of said Baca Float No. 3, to-wit: The northwest quarter of the northwest quarter of section one, township 23, south, of Range 13 East, G. & S. R. B. & M."

Transcript of Record, p. 80.

Evidence was introduced by the Wises upon the trial of this case, sustaining the allegations of the answer as to the 160-acre tract and the 40-acre tract above described.

Upon the trial of this case before the court below, Joseph E. Wise, as a witness, testified that he took possession of and fenced up the said east half of the northwest ¼ and the west ½ of the northeast ¼ and the west ½ of the northwest ¼, sec. 35, township 22 S., of Range 13 East, aforesaid, in 1889, and has been in possession of it since that time, claiming, cultivat-

ing it and occupying it, and he also testified that he had a patent for a millsite containing five acres, called the Magee millsite, and that he had been in possession of that particular five acres, the same being enclosed with a fence, since 1890. (Tr., pp. 385-387.)

It was stipulated upon the trial that Mrs. Mary E. Sykes, mother of defendant Lucia J. Wise, had been in possession continuously from the year 1900 to her death, in 1912, and that Lucia J. Wise, her daughter, as her executrix and heir, was in possession thereafter of the 40-acre tract heretofore mentioned, using, occupying and claiming the same adversely. (Tr., pp. 387-388.)

Plaintiffs Watts and Davis moved the court to strike out this testimony of the Wises, on the ground that it was immaterial in this, that a title by adverse possession could not be acquired against the government, and the lands in question were government lands until 1914, when segregated from the public domain by the filing of the Contzen survey.

This motion was granted by the court, to which ruling Joseph E. Wise and Lucia J. Wise duly excepted. (Tr., pp. 432-433.)

The Wises moved the court that the testimony be considered as taken under Equity Rule 46, and the court ordered that it be so considered. (Tr. pp. 432-433.) Therefore, the evidence is before this Court on the present appeal.

In the decree rendered by the lower court, that court adjudged and decreed amongst other things as follows:

> "6th. That until the said tract or parcel of land was segregated from the public domain of the United States on or about December 19, 1914, no adverse possession or statutory prescription

could commence or be initiated by any party to this action."

In the assignment of errors of appellants Joseph E. Wise and Lucia J. Wise the foregoing rulings of the court are assigned as error, being Assignments of Error IX and X, Transcript of Record, pages 559-562.

Said appellants also assigned as error the above quoted portion of said decree, being their Assignment of Error XX, Tr., p. 569.

These errors are also specified and assigned, as errors relied upon, in the main brief of Joseph E. Wise and Lucia J. Wise, being Specifications IX and X, pages 41-42 of said brief, and Specification of Error XX, on page 44 of said brief.

It therefore will be seen that the question is squarely presented in this case as to whether or not title by adverse possession can be acquired against the owners of Baca Float No. 3. And that question depends on whether or not the statute of limitations commenced to run against these owners from the date when title was vested in the heirs of Baca by the approval by the Surveyor General of the United States of the location made in 1864; or whether the statute will commence to run only from the time the Contzen survey was filed in the office of the Secretary of the Interior, to-wit, December, 1914.

As stated in our brief, heretofore filed herein, if the Statute of Limitations commenced to run from the time that the title vested in the heirs of Baca, to-wit, upon the approval of the location by the Surveyor General in 1864, then a good title by adverse possession could be obtained against those heirs and their grantees, by Wise or others, and the evidence introduced was material and should not have been stricken out; on the other hand, if the statute did not begin to

run until the filing of the Contzen survey in 1914, then, of course, as the ten years required for obtaining title by adverse possession only could not have run, the evidence referred to was immaterial.

The entire solution depends upon the one question: When does the Statute of Limitations of Arizona commence to run against the owners of Baca Float No. 3 and in favor of one in peaceable and adverse possession of a specific part of land within said tract.

The statute of Arizona on the subject of adverse possession, where such adverse possession is not under color of title or under a recorded deed, but is by virtue of possession only, is quoted on page 218 of our first brief, but for the convenience of the Court we will quote the same again. It is as follows:

> "Any person who has the right of action for recovery of any lands, tenements or hereditaments against another, having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward."
>
> §2938 Rev. Stats. of Arizona, 1901; also §698 Rev. Stats. of Arizona, 1913.

> "The peaceable and adverse possession contemplated in the preceding section as against the person having right of action shall be construed to embrace not more than 160 acres, including the improvements, or the number of acres actually inclosed, should the same be less than 160 acres * * * "
>
> §2939 Rev. Stats. of Ariz. (1901); §699 Rev. Stats. of Ariz. (1913).

As Wise had had adverse possession of his 160-acre tract for more than ten years prior to 1907, when he obtained his deed from King and Ireland, and more

than ten years prior to the commencement of this suit, and as Lucia J. Wise had had adverse possession of her 40-acre tract for more than ten years prior to the commencement of this suit, each had a good title under the foregoing Statute of Limitations, provided the statute ran from the date when the title to this Baca Float No. 3 was vested in the heirs, namely, in 1864.

The Supreme Court of the United States has held in regard to Congressional grants of land to railroads, that, until the selection and map thereof is approved by the Land Department, the land is not segregated from the public domain, but is part of the public domain, and therefore, is not subject to taxation. (See cases cited page 219 of our first brief.)

But the Act of Congress granting the tract of land in this case is different from the acts granting lands to railroads. The Act in this case simply requires the heirs of Baca to make the location, and the Surveyor General to approve the location as made. Upon that approval the title to the lands vests absolutely in the heirs and the lands no longer belong to the United States.

Therefore, from the date of the approval by the Surveyor General, the lands become subject to taxation, and the heirs of Baca, grantees of the government, or anyone owning under them, had right to bring ejectment or other action to quiet their title, or to obtain possession thereof, or of any part thereof, held or claimed adversely to them.

This Honorable Court in its decision rendered in the present case, quotes the opinion of the Supreme Court of the United States, wherein that court said, in denying leave to file an application for a rehearing, when the question of title was before it, the following:

> "The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864 in pursuance of the Act of June 21, 1860, c. 167, 12 Stat. 71, 72. * * * A few words of explanation will make certain the extent of our decision. In adjustment of the conflict between the Baca grant and the grant to the town of Las Vegas, the act of 1860 was passed. The land was to be located in square bodies and be 'vacant land, not mineral, in the Territory of New Mexico,' and it was made the duty of the Surveyor General of New Mexico to survey and locate the lands when selected by the heirs of Baca. There were no other conditions, and these were fulfilled in 1864."

Again, this Court in its decision in the present case, as we understand it, finds and holds that the absolute title to the lands in question passed and became vested in the heirs of Baca in 1864, when the Surveyor General approved the location they had made. On this point this Court says:

> "The title to the specific tract embraced by the location made on behalf of the heirs June 17, 1863, and approved by the Commissioner of the General Land Office April 9, 1864, had passed to the heirs, and there was, therefore, no authority in any officer of the Land Department to make or permit to be made any change in the location or boundaries of what had theretofore been Baca Float No. 3. Such being the express decision of the Supreme Court in the case of Lane v. Watts, above cited, it is needless to comment any further upon that question.
>
> In so deciding the Court evidently proceeded upon the view that the specific description con-

> tained in the application of June 17, 1863, identified the land applied for, and that the approval of that selection by the Commissioner of the General Land Office attached the title granted by Congress to that specific tract, and that no patent was required."

If, then, the location so made by the heirs of Baca in 1864, defined a specific tract, the title to which absolutely passed to them in 1864, they had the right to bring suits in the court to recover the possession thereof, by action in ejectment against any adverse claimant, and also had right to bring suit to quiet title against any such adverse claimant. And there is no reason why the Statute of Limitations should not bar the right, if such suit or action was not brought within the time required by the Statute of Limitations.

Under the statute in force in Arizona from 1881 down to the present time, any claimant to land had right to bring suit to quiet title, whether he was **in** or **out** of possession; and the Supreme Court of the United States in construing the statute of Arizona, in force from 1881 and thereafter, has so specifically held, in the case of Ely v. The New Mexico and Arizona Railroad Company, 129 U. S., 291-294. The syllabus of that case is as follows:

> "By the Act of the Territory of 1881, Chap. 59, any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title."
>
> *Ely v. New Mexico and Arizona Railroad Company*, 129 U. S. 291.

In the revision of the Arizona statutes of 1901 the

foregoing provisions are continued in force, that statute being as follows:

> "4104. (Section 1). An action to determine and quiet title to real property may be brought by any one having or claiming, an interest therein, whether in or out of possession of the same, against any person or corporation, or the Territory of Arizona, when such person, corporation or territory claims any estate or interest, adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought: **Provided, however,** That whenever the Territory of Arizona is made defendant in any such action, a copy of the summons and complaint shall be served upon the secretary of the territory and upon the attorney general of the territory; and it shall be the duty of the attorney general to appear and defend the interests of the territory involved in such action or actions."
>
> Rev. Stats. of Ariz. (1901), pages 1032-1033.

And this same Act is continued in the revision of 1913, as Sec. 1623, Revised Statutes of Arizona of 1913, which is as follows:

> "1623. An action to determine and quiet the title to real property may be brought by anyone having or claiming an interest therein, whether in or out of possession of the same, against any person or corporation or the State of Arizona, when such person, corporation or state claims any estate or interest, adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought. When the State of Arizona is made defendant in any such action, a copy of the summons and complaint shall be served upon the attorney general of the state, and it shall be his

duty to appear and defend the interests of the state involved in such action or actions."
Rev. Stats. of Ariz. (1913), pp. 580-581.

Therefore, since 1881 the heirs of Baca, and all those claiming under them, including Watts and Davis, plaintiffs in this action, had a right to bring suit to quiet title against any person in possession of any portion of said tract of land, who claimed the same adversely; and amongst the persons so in possession and claiming the specific tracts thereof adversely, whom they could have sued, were defendant Joseph E. Wise and defendant Lucia J. Wise, or her mother, Mary E. Sykes, her predecessor in interest.

Therefore, we submit, that a good title by adverse possession under the laws of the Territory and State of Arizona, could be obtained by anyone who had been in such adverse and peaceful possession for the length of time prescribed by the Arizona statute; to-wit, ten years, and that said statute did begin to run from the date that the Surveyor General approved the location of the Baca heirs, to-wit, the year 1864.

Or, if for any reason, it should be held that the action of the Interior Department in recognizing the 1866 location would excuse the heirs of Baca, or their grantees, from bringing such a suit, then, as the Interior Department, in its decision of 1899, held that the heirs of Baca were confined and bound to the location of 1863, at least from that date, to-wit, 1899, the Statute of Limitations would begin to run against the heirs of Baca and their grantees, including plaintiffs Watts and Davis and the Bouldins.

And if such is the law, then under the evidence of Joseph E. Wise and Lucia J. Wise, in this case, taken under Equity Rule 46, heretofore referred to, and set forth in the record, Joseph E. Wise has good title by

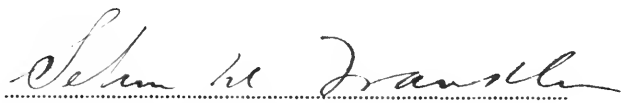
adverse possession to his 160-acre tract and millsite, and Lucia J. Wise has good title by adverse possession to her 40-acre tract.

It is a fact, admitted and testified to by Joseph E. Wise, that at one time he filed a homestead under the United States homestead law, on his 160-acre tract, and Mary E. Sykes also filed a homestead upon her tract. This was done upon the theory that the lands were public lands.

However, this Honorable Court has already held, in the case of Eastern Oregon Land Co. v. Brosnan, 97 C. C. A. 382; 173 Fed. 67 (cited in our first brief):

> "The general rule is well settled that adverse possession of land, though held in admitted subordination to the title of the government, may nevertheless be adverse to everyone else."

We, therefore, respectfully move this Court for a rehearing of this cause, so that this question, as set forth in Assignment of Errors IX, X and XX, of Joseph E. Wise and Lucia J. Wise, wherein the foregoing specific questions relative to Statute of Limitations are raised, can and will be fully considered by this Court; and that upon such consideration this Court do modify its judgment and decree herein, by decreeing the said Joseph E. Wise to be the owner of said 160-acre tract and the said 5-acre millsite, and Lucia J. Wise to be the owner of said 40-acre tract, aforesaid, or such other decree as may be meet and proper in the premises.



Counsel and Solicitor for Appellants
Joseph E. Wise and Lucia J. Wise.

STATE OF ARIZONA }
County of Pima } ss.

I, the undersigned, Selim M. Franklin, counsel for appellants, Joseph E. Wise and Lucia J. Wise, in the foregoing and above-entitled cause, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Selim M. Franklin

Counsel and Solicitor for Appellants
Joseph E. Wise and Lucia J. Wise.

Dated January —, 1917.

No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

Before Judges Gilbert, Ross and Morrow.

SANTA CRUZ DEVELOPMENT COMPANY,

Appellant,

against

CORNELIUS C. WATTS *et al.*,

Appellees.

Petition of Santa Cruz Development Company for Rehearing or for the Certification of Questions to the United States Supreme Court.

G. H. BREVILLIER,

Counsel for said Appellant and Petitioner.

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT.

SANTA CRUZ DEVELOPMENT COMPANY, Appellant, against CORNELIUS C. WATTS, *et al.*, Appellees.	No. 2719.

Petition of Santa Cruz Development Co. for Rehearing and Reconsideration, or for the Certification of Questions to the United States Supreme Court.

To the HON. WILLIAM B. GILBERT, HON. ERSKINE M. ROSS and HON. WILLIAM W. MORROW, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the appellant, Santa Cruz Development Company, by its counsel, and applies for a rehearing and a reconsideration by this Court of its opinion and the judgment and decree thereon, or for the certification by your Honors to the United States Supreme Court of the questions in this case, pursuant to Section 239 of the Judicial Code, and assigns the following reasons therefor:

FIRST. The decision of this Court on the Hawley deed is based upon an obvious misreading of Lane v. Watts.

SECOND. This Court entirely misconstrued the Prentice cases.

THIRD. This Court had no right in law or in fact to make any use of the Wrightson title bond.

FOURTH. Even under the falso demonstratio rule the Hawley deed conveyed and was intended to convey only the 1866 location.

For four years I have been studying the questions involved herein and those involved in *Lane v. Watts* (234 U. S. 525; 235 U. S. 17). From the fact that I made an argument in *Lane v. Watts* in three courts in 1913 and 1914, and prepared and filed briefs in each court, I can justly claim a familiarity with that case and the questions involved therein.

I wish to assert with the utmost positiveness that the premises upon which this Court construed the Hawley deed find absolutely no support in *Lane v. Watts*, and that none of the questions involved herein was passed upon in any way by the United States Supreme Court. As a matter of fact all the counsel for the appellees in that case signed and filed in the Supreme Court a joint supplemental brief in which it was stated:

> "None of the counsel for the appellees seeks or desires any expression from the Court as to the relative rights of the appellees as there is no such question in the case."

Certainly the 1866 selection was not mentioned in either opinion of that Court and the quotations therefrom by Judge Ross refer to an entirely different subject-matter. None of the counsel for the successful parties in this case made the

slightest claim herein, on argument or in their printed briefs, that *Lane v. Watts* passed in any way upon the 1866 selection or any question relating thereto.

The questions involved in this case are so complex and have such intimate relation to the Public Land Laws of the United States, and are based so much on decisions of the United States Supreme Court with reference to the grant and similar grants, that the quickest and most practical solution for all concerned would be for your Honors to certify the questions herein to the United States Supreme Court, under Section 239 of the Judicial Code, as the Supreme Court will undoubtedly review the decree of this Court on certiorari or appeal.

The certification of questions will quickly bring this difficult and complicated case to a final conclusion, as the Supreme Court would then unquestionably order up the entire record under its Rule No. 37, and we would apply for the advancement of the case.

We would appreciate as early a decision hereon as permitted by the demands upon your Honors' time and the care with which you consider all matters before you.

Argument.

I.

The decision of this Court is based upon an obvious misreading of Lane v. Watts.

The view which this Court took of the selection of 1866, is based on a radical misconception of the decisions of the United States Supreme Court in *Lane v. Watts*, 234 U. S. 525; 235 U. S. 17.

Judge Ross said herein:

> "We think that this decision of the Supreme Court leaves no ground for the contention that there was any

> validity in the subsequent attempt to change the boundaries of the Baca Float #3 grant, either on behalf of the grantees or on the part of any official of the Land Department * * * and there was, therefore, no authority in any officer of the Land Department to make or permit to be made any change in the location or boundaries of what had theretofore been Baca Float #3. Such being the express decision of the Supreme Court in *Lane v. Watts* above cited it is needless to comment any further upon that question."

In neither of the two Supreme Court opinions in *Lane v. Watts* was the selection of 1866 passed upon in any way; the Bill therein did not even mention it.

The only thing in either opinion in that case which has the slightest bearing upon the 1866 selection is the following extract from the first opinion (234 U. S. 525, 541):

> "A point is made upon attempts to change the location, of which it is enough to say that they were not accepted by the Land Department and the claimants were remitted to the location under consideration."

This certainly shows that the Supreme Court recognized the right of the Land Department to pass upon such applications.

The claimants of the 1866 selection "were remitted to the (1863) location under consideration" on July 25, 1899, by the decision of the Secretary of the Interior (29 L. D. 44; initialed by Mr. Justice Van Devanter, then in the Interior Department). That decision expressly recognized a right to make an actual amendment after the expiration of the three years allowed by the act of 1863, but held as a fact and for the first time that the 1866 selection, because of the diagram then before the Secretary of the Interior, was not an amendment of the original location, but an attempt to substitute a new selection. In 1887, Secretary Lamar (afterwards a Justice of the Supreme Court), refused an application for a re-

location of the grant and held the parties to the selection "as amended" in 1866 (5 L. D. 705).

As pointed out in my reply brief (pages 7 and 8), the Commissioner, as the representative of the United States in the administration of the Land Laws, had full power to allow an amendment of the location of 1863, unless and until overruled by the Secretary of the Interior prior to the passing of legal title of the amendatory location.

The Commissioner on May 21, 1866, approved the change in the location, provided that a survey should determine that the new selection was vacant land not mineral. *Valid or invalid, that was the actual situation and those "the facts and circumstances" in 1870, when Watts made his deed to Hawley.* Such was the title to the 1866 selection which Watts quitclaimed to Hawley. The 1866 selection, whether valid or void *ab initio*, was an actual tract and something which Watts could quitclaim. His deed to Hawley correctly states his supposed chain of title. *Watts and Hawley were dealing with the actualities of 1870, and not with reference to any constructive legal situation first created in 1899.*

From the application for the amended location made on April 30, 1866, it is clear that John S. Watts at that time did not desire the 1863 tract, but desired something entirely different therefrom. If he did not desire the 1863 tract, and quitclaimed to Hawley what he in fact really desired and to which in fact both believed he had secured a conditional title, the natural and logical conclusion is that his deed to Hawley cannot be held to convey land which Judge Watts did not wish to own and certainly did not wish to sell.

> "If a person supposing he is possessed of a specific tract of land in a certain neighborhood should contract for the sale of that land to another it does by no means follow that he would have sold him any other

> tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less than he would have sold it for the same price" (*Russell v. Trustees,* 1 Wheat. 432).

Further on in the opinion herein Judge Ross states:

> "It will be at once seen that the specific description in this (Hawley) deed is that of the attempted location of 1866, adjudged void by the Supreme Court in the case of *Lane v. Watts, supra,* and as to which specifically described tract the grantor had no title except to a narrow strip thereof covered also by the 1863 location of the grant."

Here again, Judge Ross makes the same error as to the decision of the Supreme Court in *Lane v. Watts,* and he also overlooks the fact that if the Commissioner or the Secretary or both had finally approved the 1866 location, neither he nor any other jurist would have any right to review such action, except for fraud of those officers. The Land Department is not only an administrative body but also a *quasi* judicial tribunal.

Judge Ross also overlooked the fact that the 1866 location was in form at least "granted" *conditionally* by the Commissioner in 1866. If it was not a "grant" in form, then the Commissioner's approval of the 1863 location on April 9, 1864 was not a "grant." The real "grant" was in an act of Congress which described no land at all. If the absolute approval of Commissioner Edmunds on April 9, 1864 was a "grant" then the conditional approval of the same Commissioner in May, 1866, of the amended location was a "grant," at least until overruled by the Secretary of the Interior in 1899. It is clear that both parties to the Hawley deed believed that the Commissioner's action in 1866 was a "grant." It is admitted that the claimants under Hawley strenuously asserted that it was a "grant" continuously thereafter until

as late as 1901, when Mathews and Syme, the Hawley claimants, made their earnest appeal to the Secretary that he overrule his decision of July 25, 1899 (Record, pp. 7, 394 to 398).

Furthermore, this Court clearly misconceived the quotation from *Lane v. Watts*, appearing on page six of the tyewritten copy of the opinion herein furnished us by the Clerk:

> "The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department. In other words, and *specifically* the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office and an attempt to do so can be enjoined."

The quotation in question was from page 540 of the first opinion of the Supreme Court and had reference, as will be seen by the preceding pages of the same opinion and from the allegations of the Bill therein, to the attempt of the officers of the Land Department, *after the Coutzen survey in 1905*, and against the protest of the grant claimants, to overrule the action taken by Commissioner Edmunds on April 9, 1864, and not to the action of the same Commissioner on May 21, 1866, in conditionally allowing an application to amend the selection.

The only mention made by the Supreme Court of any attempted changes in location is the passage heretofore quoted from page 541 of the first opinion, and that recognized the jurisdiction of the Department.

Lane v. Watts was instituted for the purpose of enjoining the officials of the Land Department from attempting, *subsequent to 1905 against the protest of the grant claimants*, to revoke or review the Commissioner's action of April 9, 1864, and to secure the filing of the plat of survey; and for no other purpose. The Government officials brought out the various attempts to relocate simply to make a far-fetched argument

that none of the claimants then believed that the Commissioner's action of April 9, 1864, passed title.

I have a bound copy of the Supreme Court record in *Lane v. Watts,* and also a bound copy of the record and all briefs. I shall be glad to submit both or either of these to your Honors if the Clerk will telegraph me at my expense.

II.

This Court entirely misconstrued the Prentice cases.

This Court clearly misread the Prentice cases. It failed to notice that in those cases the Court first and primarily held at the outset that the *metes and bounds controlled in any event;* and then, secondly, *that even if the specific description could be rejected,* Prentice would not have what he desired.

Both the Circuit Court and the United States Supreme Court in the second Prentice case found it "difficult to imagine" that anything but the specific metes and bounds could be meant to pass. The subsequent discussions in the opinions were expressly hypothetical and answers *in limine* to the contentions of Prentice, *even if it were possible to reject the metes and bounds.*

The years of study we have given the Prentice cases warrant us asking of this Court a careful consideration of the following argument:

The actual decision in the Prentice cases can be best ascertained in the following extracts from *Prentice v. Northern Pac. R. R. Co.*, 43 Fed. 270, in which the opinion by Mr. Justice Miller, then senior associate Justice of the Supreme Court, sitting at Circuit, *was adopted by the Supreme Court* and quoted at great length in 154 U. S. 163:

"The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case is now identified and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. *It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described. And if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that.*

"It is now found as a fact that this boundary would include a surface from one-half to three-fourths of which is land and the remainder is water of Lake Superior. For that reason, and for others which may be hereafter considered, *counsel for plaintiff* reject totally this part of the description of the land found in the conveyance, and proceed to consider the remaining part, which says:

" 'Being the land set off to the Indian Chief Buffalo at the India treaty of September 30, A. D., 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents.'

"*If we could reject the first description as incorrect and erroneous, and come to the latter part of it,* we are constrained to hold that this alone is not sufficiently certain to convey any definite tract of land one mile square, or nearly so. * * *

"To avoid this difficulty, counsel insists * * * that the reference to the land set off to the Indian Chief Buffalo at the treaty of 1854 meant, not any definite

piece of land, but any land which might come to Buffalo or to his appointees, of whom Armstrong is one, by the future proceedings of the government of the United States in that case; and that, no matter where such land was found, provided it was within the limits of the land granted by the Chippewa treaty, then the deed from Armstrong to Prentice was intended to convey such after-acquired interests when it was patented to the parties by the United States. We do not see anything in the whole deed or transaction between Armstrong and Prentice that points to or indicates any such construction of it.

"Both clauses of the description are definite as to the land conveyed, and treat it as a piece of land well described, well known, and well defined. Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now, as a matter of fact, find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the southwest corner of which commenced on that rock. He would not suppose that he had bought something that might be substituted in lieu of that mile square by future proceedings of the government of the United States. * * *

"Much stress is laid upon cases found in the Supreme Court of the United States, referred to in the case of *Prentice v. Stearns*, already decided. *Between the cases of Doe v. Wilson, and Crews v. Burcham and this, a broad difference exists. The lands reserved by treaty in those cases to the parties who conveyed their interests to others never had been described, never had been selected, and it was only known that they would be entitled to a certain amount of land afterwards to be selected by the president under that treaty.* * * *

"But *in the case before us, not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could*

> *be conveyed specifically, and which Armstrong undertook to convey specifically. It is not necessary that we resort to the supposition that Armstrong was talking about some vague and uncertain right—uncertain, at least, as to locality, and as to its relation to the surveys of the United States—which he was intending to convey to Prentice, instead of the definite land which he described or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two distinct descriptive clauses, neither of which had that idea in it."*

Thus it will be seen that the Court *decided first* that the specific description, by metes and bounds from a well ascertained beginning point, controlled the deed and fixed the extent of the conveyance; and that even

> *"if we could* reject the first description as incorrect and erroneous, and come to the latter part of it,"

even then there would be no merit in the contentions of Prentice, as a literal reading of the general words would not, in any event, convey either the land which Prentice desired or the general rights. In other words, after deciding (43 Fed. 270, 274; quoted in 154 U. S. 163, 173), that

> *"it would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land than that so clearly described"*

by metes and bounds, the Court said that *even "if we could reject" the metes and bounds*, it was a sufficient answer *in limine* that the general words, from the literal way in which the Court construed them, did not convey either what Prentice desired or the general rights under the treaty.

The Court, therefore, answered Prentice in two ways; first, that the specific description "leaves no doubt where the

land was," and the deed must be held thereto; and second, even *"if we could reject the first description as erroneous,"* the necessarily literal construction of the general words did not give Prentice what he wanted.

Justice Miller's use in 43 Fed. 270, 274, of the *conditional premise,*

> "If we could reject the first description as incorrect and erroneous,"

was neither inadvertent nor accidental. In the first Prentice case (20 Fed. 819, 823) he likewise held himself bound by the specific description, and that even if he could reject it, he would be unable to accept Prentice's construction of the general words. The Justice said (p. 823):

> "This is the meaning of the language, and to put any other construction upon it is (1) to strain a point, and (2) *to suppose it possible to strike out that first portion of the deed which gives a clear description of the land and its location and its boundaries.*" (Parenthetical numbers and italics are ours.)

Justice Miller refused to "strain a point" by giving Prentice the general rights which Armstrong actually received from his grantors or the indemnity land which the United States gave Armstrong. Justice Miller also refused "to strike out * * * a clear description of the land, its location and its boundaries," even though those boundaries were of a tract of land never selected and largely under water. At bar, this Court has certainly been moved both "to strain a point" and to disregard the metes and bounds of an actual tract, actually selected and actually deemed validly located at the time.

Justice Miller and the Supreme Court found it "difficult" even "to imagine" that anything else but the metes and bounds passed to Prentice. This Court found no such mental difficulty and eliminated a correct description of an actual tract,

which Hawley's grantees repeatedly admitted was all they desired or had purchased.

Thus it will be seen that the *actual decision* in the Prentice cases was:

1. The specific description controlled the deed; and

2. Even if it were possible to reject the metes and bounds, the general words, in their necessarily strict literal construction, did not give what Prentice sought.

The same test of literal construction which Justice Miller applied at Circuit in the second Prentice case, in refusing (*even if he had the right*) to construe the words "set off to the Indian Chief Buffalo at the Indian Treaty" to mean the general right of selection given by the treaty and "afterwards disposed of by said Buffalo to said Armstrong," is decisive in the case at bar that *the specific conveyance of a specific selection under a grant does not convey another specific selection, which is subsequently decided to be the valid location.*

To paraphrase Justice Miller's opinion (quoted in 154 U. S. 163, 174):

> "The selection (of 1866) had definiteness about it to a certain extent. It was a thing which could be conveyed specifically and which (Watts) undertook to convey specifically. (Hawley) would not suppose that he had bought something which might be substituted in lieu of that * * * by future proceedings of the government of the United States. * * * If such were (the grantor's) purpose in this conveyance, it is remarkable he did not say so in the very few words necessary to express that idea. * * * It would be difficult, the beginning point being well ascertained, to imagine that (Watts) intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described."

All this is further brought out by the cases which Justice

Miller distinguishes, namely, the two cases where there had been no specific selection and, therefore, a general conveyance passed the ultimate location. Justice Miller and the Supreme Court pointed out in the second Prentice case,

> "not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; *it was a thing which could be conveyed specifically, and which Armstrong undertook to convey specifically.*"

In the Prentice cases, as well as the case at bar, both parties believed the specific description correctly described a tract which the grantor had some right to convey under a grant or a supposed grant.

Furthermore, in the Prentice case, about one-half of the land specifically described was under the waters of Lake Superior, showing mistake of some kind; and the selection by Buffalo was simply of a mile square,

> "the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point."

In the case at bar the metes and bounds of the Hawley deed accurately describe the selection of 1866 and an actual tract of valuable land.

The Court in the Prentice cases said that if the rights to land ultimately allotted to the grant had been intended to pass,

> "it is remarkable that he (Armstrong) did not say so in the very few words necessary to express that idea,"

although the recited deed wherein the land

> "was afterwards disposed of by said Buffalo to said Armstrong"

contained no metes and bounds, but simply conveyed the general rights. If the recited deed in the Prentice deed—which in fact conveyed the general rights desired by Prentice and which Armstrong afterwards solemnly admitted in writing (154 U. S. 163, 166 to 168) were intended to pass to Prentice—did not operate to pass those general rights, how can it been said that the recited deed in the Hawley deed has that effect?

If the metes and bounds, though largely under water, controlled in the Prentice cases, erroneously used as they were to describe the supposed location of the grant, why do not the metes and bounds control at bar, describing as they do one of two *actual* locations of the grant, and one which was then, and until 1899, supposed to have at least some validity?

If the words "set off to the Indian Chief Buffalo" did not supersede the metes and bounds, how can the parenthethical words at bar in a *separate sentence:*

> "The said tract of land being *known* as location No. 3 of the Baca series,"

have such an effect, especially when the bill herein declares and the uncontradicted testimony shows that the metes and bounds of the 1866 location were in fact "known as location No. 3 of the Baca series" at the time of the Hawley deed and for many years thereafter?

In the Prentice cases, the words,

> "Being the land set off to the Indian Chief Buffalo at the Indian Treaty of September 30, A. D. 1854"

were held not to nullify the specific description and even not to refer to what was actually given Buffalo at the treaty, namely, a right to select a section of land. How then, can it be said that the words in the Hawley deed, "granted by the United States to the heirs of Baca" nullify the metes and bounds, especially when the United States herein through its

proper officer made a conditional grant of the specific description of the 1866 selection which was supposed to be valid until 1899, and the 1863 selection was repeatedly declared by the Land Office to be an unapproved grant until the decisions in *Lane v. Watts?*

How is it possible for this Court to hold that a conveyance in 1870 by metes and bounds of an actual tract, which was then actually deemed a valid conditional location of the grant, conveyed another tract which many years thereafter was held to be the only valid location?

How can a conveyance of one tract by metes and bounds convey on its face, not only the land specifically described, but another tract also?

This Court entirely lost sight of the fact that the metes and bounds of the Hawley deed correctly describe an actual tract of land, a tract in which the grantor then had or was supposed to have some interest. If the wrong tract was described, the remedy is a suit for reformation (*Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 176). A deed of specific metes and bounds cannot be held an ambulatory conveyance whose subject-matter shifts as Sahara sands in a desert storm.

To paraphrase again Justice Miller and the Supreme Court in the second Prentice case:

> "The grantor in that (Hawley) deed supposed he was describing a specific piece of land, and that both the description by metes and bounds and the description with reference (to the grant and the title out of the Baca heirs) were the same, and identical."

As Judge Ross well said, only one tract was meant to pass. It follows inevitably that what was specifically described by metes and bounds was the specific object of the conveyance, under the well-known rule that what is most specifically set forth is the clearest evidence of intent. To say otherwise here-

in will overrule the Prentice cases, overrule every canon of construction and disregard every principle of common sense.

III.

This Court had no right in law or in fact to make any use of the Wrightson title bond.

This Court relied upon the Wrightson title bond as evidence of the intention of the grantor in a deed to another party executed seven years after the bond.

On pages thirty to thirty-seven of my main brief I point out how untenable in law and unwarranted in fact is any attempt to use the Wrightson title bond to construe the Hawley deed.

This Court states that the record shows that subsequent to June 17, 1863:

> "Wrightson, to whom Watts had for a large consideration agreed to convey in advance of its location the float then claimed by him, found upon examination that most of the land intended to be included in the location made by Watts in 1863 had been left out by mistake * * * The specific description of which latter attempted amended location was * * * inserted in the deed from Watts to Hawley, the assignee, through various mesne conveyances of the interest of Wrightson."

There is absolutely no evidence in this case that the Wrightson title bond applied to Baca Float No. 3, or any location of it. As a matter of fact, No. 5 was also "unlocated" at the time of the Wrightson bond. Furthermore, Wrightson died before the 1866 location was made (Record, p. 176)

The statement that Hawley was "the assignee through vari-

ous mesne conveyance of the interests of Wrightson," is absolutely without any support in the record. No assignment out of Wrightson was even attempted to be proved (Main Brief, p. 30).

If, as Judge Ross suggests, Wrightson or any of his alleged assignees did not want the 1863 tract but picked out through Judge Watts another tract of land and had him describe that in a quitclaim deed to Hawley, then it is difficult to see how the Hawley deed can be held to cover on its face land which Wrightson did not want, instead of land which, as this Court says, Wrightson picked out on the ground and his alleged assignee had inserted in the Hawley deed.

IV.

Even under the Falso Demonstratio Rule the Hawley deed conveyed and was intended to convey only the 1866 location.

Judge Ross's quotation from Broom's Legal Maxims as to *the falso demonstratio rule is expressly limited therein to cases where the false part of the description applies to no subject and the true part to one subject only, and then the Court "rejects no words but those which are shown to have no application to any subject."*

In our case, the specific description certainly applied only to the 1866 tract, an actual tract, and one which was conditionaly approved by the Commissioner in 1866, and which the Hawley title claimants as late as 1901 insisted was just what they desired.

As pointed out in my main brief (pp. 64 to 68), the title references in the Hawley deed can refer to both the 1863 and 1866 tracts. The statement of locality refers to the 1866

tract alone, as will be shown by the map. The statement of tract name refers, from the allegations of the bill and the uncontradicted evidence herein, only to the 1866 tract. It will be seen, therefore, that the quotation as to the *falso demonstratio* rule entirely negatives any authority in the Court to make the decision which it has rendered.

The *falso demonstratio* rule never applies where the specific description correctly describes some tract.

Washburn on Real Property, 6th Ed., Sec. 2319.
Tiedeman on Real Property, 2nd Ed., Sec. 829.
Prentice v. N. P. R. R. Co., 154 U. S. 163, 176.
Russell v. Trustees, 1 Wheat. 432, 436, 437.
Muto v. Smith, 55 N. E. 1041; 175 Mass. 175; opinion by Mr. Justice Holmes.
Cassidy v. Charlestown Bank, 21 N. E. 372; 149 Mass. 525.

If through inadvertence the wrong tract has been specifically described, the grantee must have the deed reformed.

Prentice v. N. P. R. R. Co., 154 U. S. 163, 176.
Cassidy v. Charlestown Bank, 21 N. E. 372; 149 Mass. 525.
David v. George, 134 S. W. 326; 104 Tex. 106.

The alleged "false part" in the Hawley deed applies to and correctly describes an actual tract, one to which the grantor was then supposed to have some title, and which his grantees claimed continuously and strenuously until as late as 1901. The alleged "true part" instead of applying to "one subject only" applies to the land specifically described in the Hawley deed, as well as to the 1863 tract. Even under the rule invoked by the Court, the Hawley deed must be held to the metes and bounds thereof.

Of course, the intention of the grantor in the Hawley deed must be obtained from the deed itself. On pages 70 and 71 of my main brief, I point out why Hawley wanted the 1866

tract and that alone; and on pages 72 to 75 of the same brief, I show how the parties and their successors in interest construed it.

As an actual tract was accurately described, a tract in which the grantor had some interest or supposed interest at the time, no construction of the deed is necessary, especially in view of the unquestioned rule that the specific description controls in a deed (Main Brief, pp. 37 to 49).

But let us read the deed and see what it means:

> "All that certain (*not floating or shifting, but certain*) tract, piece or parcel of land, lying and being in the Santa Rita mountains (*by looking at the map opposite page 6 of my main brief it will be seen that the 1866 tract is certainly in those mountains and the 1863 tract is not*) in the Territory of Arizona, U. S. A., containing 100,000 acres of land more or less (*both tracts contain the same acreage*), granted to the heirs of Luis Maria Cabeza de Baca by the United States (*the 1866 tract, as heretofore explained, was certainly granted in form at least by the United States to the Baca heirs in 1866, and was supposed to have been validly granted until after 1899*) and by the said heirs conveyed to the party of the first part by deed dated on the first day of May, A. D. 1864 (*whatever right Judge Watts had to the 1866 tract passed to him under that deed, because if he finally secured title to the 1866 tract it would only be on a surrender of his rights to the other tract, just as the assignment of a chose in action vests by implication alone in the grantee the right to use the name of the grantor for all purposes of procedure*), bounded and described as follows (*the metes and bounds need not be repeated because admittedly they refer only to the 1866 tract, an actual tract of valuable land*). The said tract of land (*namely, the tract just specifically described*) being known as location number three of the Baca series (*not known as that in the deed to the grantor; not known as such*

in the grant from the United States, for three different tracts have borne that name; but known by that name at the time of the deed; and from the bill herein, the maps and the uncontradicted testimony only the specifically described tract—only the 1866 tract—was 'known as location number three of the Baca series' at the time of the deed)."

What is there difficult about the deed? Why is there any need for construction or the citing of authorities or the writing of long opinions? The deed is so simple that a child can read it and know just what it means. Its form, contents and double acknowledgment show the art and skill of a careful conveyancer. Difficulty and obscurity must be injected into the deed, for its language is clear, accurate and precise. Desperate efforts and involved arguments are necessary to make its simplicity complex or its meaning anything but plain.

Hawley had a very apparent design and a very important object in endeavoring to secure only the land in the amended location. He knew it was different from the 1863 location; a mere inspection of a map or the deed from the Baca heirs to Judge Watts would demonstrate that. Certainly Hawley made some examination of map or title before he "bought." The 1866 tract is mountainous mineral land, the kind of land which Hawley knew he had no right to take under the Act of Congress; but he wanted that mineral land. Judge Watts, knowing the condition attached to the approval of the selection thereof, would give only a quitclaim deed. Hawley's purpose in having the 1866 tract specifically described is too obvious to require argument: he wanted mineral land. In those days, in the absence of railroads, with the Apaches a constant menace, only the lure of mineral would tempt anyone to go to southern Arizona. If the 1866 selection had been finally approved, certainly no one would contend that the deed covered the 1863 tract and not the 1866 tract; how then, can the final disapproval of the 1866 selection change the deed?

The Court's construction of the deed requires the arbitrary elimination of the metes and bounds. Those metes and bounds were inserted, not as an empty formality but for a very obvious purpose. They were used to show an intent that the 1863 tract of valley land should not pass, as all its water and all its agricultural land were then usurped by the holders of Mexican grants, and no Eastern investor or speculator would take anything but mineral land. This explains why the statement of tract name was so carefully worded and so carefully separated from the recital of the deed to the grantor.

For some reason, probably to protect some mining operations, Hawley wanted a quitclaim of Judge Watt's rights in the 1866 tract, but did not consider the title under the deed of sufficient importance to record it until fifteen years thereafter. The witness Magee had charge of the 1866 tract for many years for a mining company and met Hawley on the ground, and tried to get the Surveyor-General of Arizona to survey it. The witness frankly said he had nothing to do with the 1863 tract. How then, can it be said that the grantor and grantee intended the 1863 tract to pass, and not the 1866 tract which they so carefully described?

If the 1866 tract was in the minds of the parties when the deed was executed, and every indication therein shows that it was, then that tract alone passed; otherwise no lawyer may hereafter believe his eyes when he reads a deed or trust his judgment when he draws one.

This Court failed to explain in its opinion how, if the words of grant and conveyance to Watts control in the Hawley deed, that the subsequent deeds in the same chain of title which omit those words can pass anything but the land specifically described, especially where such deeds convey selected parts of the 1866 tract in partitions and even specifically say that the metes and bounds are correct. The Court's own

argument demonstrates that the successful parties herein have no title.

I understand that Mr. Franklin is applying for a rehearing on the ground that this Court did not pass on the questions of adverse possession in its opinion. I discussed the subject of adverse possession in my supplemental brief. The counsel for Watts and Davis and the Bouldins also discussed the subject in their main briefs.

The decision of the Court on the Hawley deed is erroneous and should be withdrawn.

Respectfully submitted,

G. H. BREVILLIER,
Counsel for Santa Cruz Development Company.

January 29, 1917.

Certificate of Counsel.

I hereby certify that I am of counsel for Santa Cruz Development Company, appellant and petitioner herein; and that in my opinion and judgment the foregoing petition for a rehearing, etc., is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

G. H. BREVILLIER,
Counsel for said Appellant
and Petitioner.

No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Before Judges GILBERT, ROSS and MORROW.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

v.

CORNELIUS C. WATTS, *et al.*,
Appellees,

MEMORANDUM ON BEHALF OF PLAINTIFFS AND DEFENDANTS BOULDIN.

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Memorandum in opposition to the Allowance of an Appeal to the Supreme Court of the United States.

The plaintiffs, and the Bouldin defendants, desire to present this memorandum, setting forth the reasons why this Court should not allow an appeal from its decision to the Supreme Court of the United States.

It may be claimed that an appeal will lie in this case because it is one which "arises under the Constitution or laws of the United States," and is, therefore, not made final in the United States Circuit Court of Appeals by section 128 of the Judicial Code. If this

case is one arising under the "laws of the Unted States," then an appeal will lie; if it is not such a case, within the meaning of the Judicial Code, then no appeal will lie.

Argument.

The District Court had jurisdiction of this case solely on the ground of *diversity of citizenship,* and the preliminary paragraph of the plaintiffs' bill of complaint is devoted to setting out the diversity of citizenship which gave the District Court jurisdiction. We contend that that was the sole ground upon which the District Court had jurisdiction. In the case of *Shulthis* v. *McDougal,* 225 U. S. 561, an appeal was sought to the Supreme Court of the United States from the Circuit Court of Appeals for the Eighth Circuit on the ground that the case was one arising under the "laws of the United States." The Supreme Court, in an opinion by Mr. Justice Van Devanter, dismissed that appeal and set forth succinctly the rules by which the appealability of such causes are determined. The Court say (568):

> "Section 6 of the act of March 3, 1891, (now section 128 of the Judicial Code) * * * declares that 'the judgments decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States,' and this refers

to the jurisdiction of the Federal court of first instance."

* * * * * * * *

and (p. 569):—

"In opposing the motion the appellants contend that the case arose under certain laws of the United States, presently to be mentioned, and therefore was not one in which the jurisdiction depended entirely on diversity of citizenship. The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:

"1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. *Colorado Central Mining Co.* v. *Turk,* 150 U. S. 138; *Tenneessee* v. *Union and Planters Bank,* 152 U. S. 454; *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526; *Devine* v. *Los Angeles,* 202 U. S. 313, 333.

"2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred

argumentatively from the statements in the bill, for jurisdiction cannot rest or any ground that is not affirmatively and distinctly set forth. *Handford* v. *Davies,* 163 U. S. 273, 279; *Mountain View Mining Co.* v. *McFadden,* 180 U. S. 533; *Bankers' Casualty Co.* v. *Minneapolis & Co.,* 192 U. S. 371, 383, 385.

"3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. *Little York Gold-Washing and Water Co.* v. *Keyes,* 96 U. S. 199; *Colorado Central Mining Co.,* v. *Turk, supra; Blackburn* v. *Cortland Gold Mining Co.,* 175 U. S. 571; *Florida Central & P. Railroad Co.* v. *Bell,* 176 U. S. 321; *Shoshone Mining* v. *Rutter,* 177 U. S. 505; *De Lamar's Nevada Co.* v. *Nesbitt,* Id. 523."

The foregoing case is cited and followsd in:—

Hitchman C. & C. Co. v. *Mitchell,* 241 U. S. 644;
Glass v. *Woodman,* 241 U. S. 646;

Gardiner Inc. Co. v. *The Jackson Co.* 239 U. S. 628;
Mound City Co. v. *Castleman,* 235 U. S. 689;
Raphael v. *W. & J. R. R. Co.,* id. 684;
Ritterbusch v. *A. T. & S. F. Ry. Co.,* id. 683;
Glenwood L. & W. Co. v. *Glenwood Springs,* 231 U. S. 735;
Star Chronicle Pub. Co. v. *United Press Association,* 232 U. S. 714.

The Bill of Complaint.

The first paragraph of the bill of complaint sets out in full the 6th section of the Act of Congress approved June 21, 1860. The second paragraph alleges that on June 17, 1863, pursuant to the provisions of said act, the heirs of Luis Maria Baca selected the land here in controversy. At no other place in the bill of complaint does any mention of an act of Congress occur. The paragraphs subsequent to paragraph two are devoted to tracing the title on down to the present owners. It does not appear on the face of the bill of complaint that there is any dispute or controversy respecting the validity, construction or effect of the act of June 21, 1860, upon the determination of which the result of the suit depends. The act of June 21, 1860, is set out merely as one of the instruments in the chain of title; as the original grant from the sovereign to the heirs of Baca. There is no allegation that the result of the suit depends upon the validity, construction or effect of that act, and no intimation whatever that the jurisdiction of the Dis-

trict Court is sought upon the ground that any controversy has arisen under that act. On the other hand, the jurisdiction is expressly predicated upon the ground of diversity of citizenship. Any federal question which may have arisen in this case does not appear in the bill of complaint, and unless that question does appear in the bill of complaint, the case is not one arising under the "laws of the United States."

The third section of Justice Van Devanter's statement of the rules by which the appealability of such causes shall be determined fits this case exactly. The right of the plaintiffs and the Bouldin defendants to this land has its origin in the act of June 21, 1860, and this is "a suit involving rights to land acquired under a law of the United States." That is the only reason why the sixth section of that act of Congress is quoted in the bill, and, as Mr. Justice Van Devanter has well said, if that be a sufficient ground upon which to predicate an appeal then every suit involving land in the western States must be one arising under the "laws of the United States", because the source of the title to practically all land in the West is some land grant act of the United States.

Some other cases involving the right to an appeal in cases of a nature similar to this are:

Metcalf v. *Watertown,* 128 U. S., 586.

Joy v. *City of St. Louis,* 122 Fed., 524. (In this case the court says that "it is settled law that all doubts must be resolved against jurisdiction.)

Myrtle v. *Nevada C. & O. Ry.*, 137 Fed., 193.

Bagley v. *Fire Extinguisher Co.*, 212 U. S., 477.

Montana Ore-Purchasing Co. v. *Boston & M. Consol. Copper & Silver Mining Co.*, 93 Fed., 274 (decided by the United States Circuit Court of Appeals for the Ninth Circuit).

If the validity, construction or effect of the act of June 21, 1860, had been involved, the case would not be appealable for the reason that the act is not within the designation of "laws of the United States" as used in allowing appeals. As said in *American Security & Trust Co.* v. *Comm'rs D. C.*, 224 U. S. 491, the law must be one of general application throughout the United States. This the act of June 21, 1860, certainly was not.

For the reasons given above, we respectfully pray the Court not to allow an appeal to the Supreme Court of the United States from their decision in this case.

HERBERT NOBLE,
HARTWELL P. HEATH,
Attorneys for Appellants and
Appellees, Watts and Davis.

JOSEPH W. BAILEY,
WELDON M. BAILEY,
Attorneys for Bouldin
Appellants and Appellees.

No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Before Judges GILBERT, ROSS and MORROW.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

v.

CORNELIUS C. WATTS, *et al.*,
Appellees,

SANTA CRUZ DEVELOPMENT COMPANY,
Appellant,

v.

CORNELIUS C. WATTS, *et al.*,
Appellees.

BRIEF ON BEHALF OF WATTS AND DAVIS.

HERBERT NOBLE,
HARTWELL P. HEATH,
Attorneys for Watts and Davis.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE and LUCIA J. WISE,

Appellants,

v.

CORNELIUS C. WATTS, *et al.*,

Appellees,

SANTA CRUZ DEVELOPMENT COMPANY,
a corporation,

Appellant,

v.

CORNELIUS C. WATTS, *et al.*,

Appellees.

MEMORANDUM ON BEHALF OF APPELLEES CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.

While Watts and Davis respectfully submit that neither the petition of Joseph E. Wise and Lucia J. Wise for a rehearing nor that of Santa Cruz Development Company

for rehearing or for certification of questions to the United States Supreme Court show the basic grounds for a rehearing such as a failure of the Court to pass on any of the questions presented on the appeals or a misapprehension by the Court of any proposition properly before it or a decision subsequent to the argument and submission of the appeals by a higher court requiring a decision on any of the issues different from that arrived by this court, nevertheless it is believed that there are certain facts in connection with such applications to which the Court's attention should be directed.

As to the Petition of Joseph E. and Lucia J. Wise for Rehearing.

It contains many reckless and misleading statements such as (p. 3) "This Court, in its decision in this case, has not considered at all this vital question", meaning the claim of the Wises to title by prescription or adverse possession. Courts have often pointed out that counsel have no right to conclude that the court has not considered any question merely because it is not specifically mentioned in the opinion. In this case the court specifically said in its opinion (p. 33):

> "The other points made by counsel have been carefully considered, but we do not think they require special mention."

In their answer the Wises had made this claim of title by adverse possession. It was the subject of exceptions

by the Wises, and it was fully argued in the briefs in the lower court and in this court. Consequently this must have been included among "The other points" to which the court made this express reference. It was expressly decided against the Wises by the lower court and necessarily decided and decided adversely to the Wises by this court which affirmed the decree of the lower court without modifying the decree as to its findings on adverse possession.

The decision is sound and well within settled legal principles and is sustained by numerous cases, some of which are cited in Watts and Davis' main brief (pp. 59-61) and in the Reply Brief of Santa Cruz Development Company (pp. 1-7, 13) and in that Company's Supplemental Brief (pp. 1-3) and the time of the Court will not be taken up by repeating what is there said on the subject.

Notwithstanding the statement quoted from the Wises' petition, that the court had "not considered at all" the question, the petition (p. 3) alleges:

> "The only defense to these suits in ejectment is the defense of adverse possession, for such period of time as to ripen into a title. This defense cannot be made by the Wises in the ejectment suits, because the decree of this court in the present case, is *res adjudicata* upon that defense. * * *"

Again the petition (p. 5) says:

> "the decree in this case * * * in effect adjudicates that neither of the Wises has any title to these two tracts of land."

These statements are clearly admissions that this court considered and decided the point.

Statement (p. 5) that "Long prior to 1899 the Government extended the public surveys over the tract described in the 1863 location" is inaccurate and misleading for the reason that according to our understanding of the matter there is no evidence in the record that the maps mentioned in the petition were made or authorized by the Government or that any government survey was made of this land until the one approved and filed December 14, 1914 segregating the land from the public domain. (*Stoneroad* v. *Stoneroad*, 158 U. S. 240.)

Another misleading statement or statements appear (pp. 4, 5) by which the impression is given that the Wises expended $30,000 in erecting a two-story brick dwelling on the 40 acre tract when the fact is that this building was erected long before the Wises made any claim to the possession of the property; that, to use a ~~court~~ expression the Wises jumped this property.

The statutes of limitation of Arizona quoted in the petition of the Wises have no application to an action like this for the reason that it is not within the description of "a suit or action to recover land or real property", such statutes only applying to actions in ejectment.

McCampbell v. *Durst*, 15 Tex. C. A. 522;
Knight v. *Valentine*, 35 Minn. 367.

We understand that the statute of limitations are quoted in the petition of the Wises for the purpose of

showing that an action in ejectment would not lie and hence the claim of adverse possession has ripened into title.

The petition admits (pp. 12, 14) that adverse possession can not ripen into title unless the correlative right to bring ejectment exists which it can not be said was the case here in view of the decision in *Stoneroad* v. *Stoneroad,* 158 U. S. 240.

United States v. Morrison, 240 U.S.192,199,210.

As to the Petition of Santa Cruz Development Company.

It is to be observed generally that it presents nothing new but merely repeats the arguments contained in the briefs filed on behalf of the Santa Cruz Development Company and contends for Mr. Brevillier's interpretation of the cases on which this court based its conclusions rather than that of the three experienced judges who heard, considered and decided the case.

This court correctly read the decisions in *Lane* v. *Watts.* The court there held beyond doubt that title passed out of the United States on the approval by the Commissioner of April 9, 1864, and that thereafter neither he nor his successors could exercise any jurisdiction over the land except to have it surveyed for the purpose of establishing its outboundaries and segregating it from the public domain. This necessarily included the holding that the 1866 location was made without authority and was void.

The point as to the right of the court to refer to the Wrightson bond is not well taken but is inconsequential

since the court had on perfectly sound grounds, concluded that the Hawley deed conveyed the 1863 location and merely referred to the Wrightson bond as supporting its conclusions.

Too Late to Ask that Questions be Certified.

The rule is established by a large number of cases that the certification of questions under Section 239 of the Judicial Code is a matter for the court, on its own motion, that it will not be done after the decision as that would be contrary to the purpose and intent of the provision and that it should be done only in cases of grave doubt.

An excellent statement of the principles on which the court will certify questions under this section of the Code and the time when it will be done is to be found in *Cella* v. *Brown,* 144 F., 742, at page 765, which the court is respectfully asked to read.

Other cases illustrating the application of the rule are:

Columbus Watch Co. v. *Dobbins,* 148 U. S., 266.
Dickinson v. *United States,* 174 F., 808.
German Insurance Co. v. *Hearne,* 118 F., 134.
Andrews v. *Nat. Foundry & Pipe Wks.,* 77 F., 774.
Louisville R. R. Co. v. *Pope,* 74 F., 1.
Fabre v. *Cunard S S. Co.,* 59 F., 500.
The Horace B. Parker, 74 F., 640.
Federal Statutes Annotated v. 2 *Supp.,* 1912, p. 1343, *et seq.*

In this case the decision having been made, it is too late to certify any question under Section 239 aforesaid; even if there had been any question in the case as to which the court had "grave doubts" which there was not, since the grounds on which the court's conclusions as to the Hawley deed and as to each and every question passed on are within settled principles of law in support of which the cases are numerous.

There is no occasion for a rehearing as to either the Wises or the Santa Cruz Development Company and the court has no authority *at this time* to certify any question to the Supreme Court.

We have read the brief submitted on behalf of the Bouldin Appellants and Appellees and will not further extend this brief.

HERBERT NOBLE,
HARTWELL P. HEATH,
Attorneys for Cornelius C.
Watts and Dabney C. T. Davis.

No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Before Judges GILBERT, ROSS and MORROW.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

v.

CORNELIUS C. WATTS, *et al.*,
Appellees.

BRIEF OF APPELLANTS AND APPELLEES BOULDINS.

JOSEPH W. BAILEY,
WELDON M. BAILEY,
Attorneys for Bouldins.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE, *et ux.*,

Appellants,

v.

CORNELIUS C. WATTS, *et al.*,

Appellees.

BRIEF ON THE APPLICATIONS FOR A REHEARING.

On behalf of the Bouldin appellants and appellees we submit this brief on the applications for rehearing filed by Joseph E. Wise and Lucia J. Wise and the Santa Cruz Development Company.

The Petition of the Santa Cruz Development Company.

The Santa Cruz Development Company has filed a petition for a rehearing or for the certification of the

questions in this case to the United States Supreme Court. The chief reason that they advance in support of their request for the certification of the questions to the Supreme Court is that it will expedite the cause for the reason that the Supreme Court will "*undoubtedly*" review the decree of this Court on certiorari or appeal. That statement well indicates the whole tenor of their petition for a rehearing. In the first place, it is certain that the Supreme Court will not review this case on appeal, for the reason that there is no appealable question in it; and, in the second place, it is almost as certain that the Supreme Court will not review it upon a Writ of Certiorari, for the reason that the Writs of Certiorari are few and far between, and that there is no question whatever in this case upon which any one might reasonably suppose that the Supreme Court will grant such a writ.

The request that this Court certify the questions in this case to the Supreme Court is absurd. The Circuit Court of Appeals cannot certify an entire case to the Supreme Court.

> *Quinlan* v. *Green County,* 205 U. S., 410.
> *John* v. *The Folmina,* 212 U. S., 354.
> *Chicago B. & Q. Ry. Co.* v. *Williams,* 214 U. S., 492.
> *Cross* v. *Evans,* 167 U. S., 60.

Furthermore no request for such a certificate can be made after the decision of the Circuit Court of Appeals. The purpose of the provision of the Judicial Code allow-

ing certificates to the Supreme Court is to aid the Circuit Court of Appeals in its decision of the case. It must be asked for before the decision and cannot be made to serve as an appeal.

On the second page of this petition the attorney for the Santa Cruz Development Company quotes an expression from a brief filed in the case of *Lane* v. *Watts*. When that case first came to trial it was agreed by all the plaintiffs that they would join in the suit against the Secretary and the Commissioner, and that none of them would attempt to gain any advantage over the others in that suit. Mr. Brevillier, the attorney for the Santa Cruz Development Company, filed a brief in the Supreme Court of the United States which contained the following paragraph:

"Alleged Title of Appellees Davis and C. C. Watts.

"The appellees, C. C. Watts, and D. C. T. Davis, Jr., claim under an instrument which is either an attempted assignment of mortgage or a power of attorney (Printed Record, p. 332), made to them 'as trustees,' by the surviving trustee and the heirs and legal representatives of a deceased joint trustee, named in a mortgage (Printed Record, p. 337), made by Arizona Copper Estate (of land in a civil law state) to Alex F. Mathews and S. A. M. Syme, who were in fact trustees, as will appear by the language of the mortgage; and S. A. M. Syme, the other joint trustee is still living (Printed Record, p. 334). Mathews and Syme had title to the invalid amended

location of 1866 (Printed Record, pp. 325 to 332), under a chain of deeds, beginning with the assignment by John S. Watts to Christopher E. Hawley in 1870 (Printed Record, p. 332), which purported to transfer by *quit claim deed* the interest of the grantor, John S. Watts, by metes and bounds in that one of the three separate locations of Baca Float No. 3, known as the attempted amended location of 1866. If there was any right to make such amended location, it passed to John S. Watts as one of the incidents or appurtenances of the deed of May 1, 1864, of the 1863 location; and the mere reference to that deed in the Hawley instrument as the *source of title* cannot overrule the specific description in the instrument of land in which the grantor had some interest in 1870, and which the successors in title of Hawley continued to assert to be the true location until the Secretary decided in 1899 (Printed Record, p. 209) that the attempted amended location of 1866 was void *ab initio.*"

This paragraph was construed by the other counsel in the case as an attack upon the title of the successful parties in this case, and an attempt to get the Supreme Court of the United States to express some opinion as to which set of claimants had the better title, and consequently as a violation of the agreement that none of them would attempt to gain an advantage over the other in that suit. The supplemental brief in which the quotation on page 2 appears was then filed in order to negative that action on the part of counsel for the Santa Cruz

Development Company. That was its only purpose and it had no bearing whatever on this case.

Santa Cruz Development Company asks a rehearing on four grounds. First, that the opinion of this Court is based upon an obvious misreading of *Lane* v. *Watts;* second, that this Court misconstrued the Prentice Cases; third, that this Court had no right in law or in fact to make any use of the Wrightson title bond; fourth, that even under the *falsa demonstratio* rule the Hawley deed conveyed and was intended to convey only the 1866 location. His argument in support of these propositions contains nothing new. It was all included in his original brief, and was fully answered in the briefs which were filed at the argument. The Court has disposed of all his contentions in its opinion, and we will not consume the time of the Court in discussing them further.

Permit us to say, however, that we were of counsel in the case of *Lane* v. *Watts* and are familiar with the record and opinion in that case. We here and now state, also with "the utmost positiveness" that this Court did not "misread" *Lane* v. *Watts*. Permit us also to say that "for four years we have been studying the questions involved herein" and that "the years of study we have given the Prentice cases warrant us" in asserting with "the utmost positiveness" that this Court did not "misread" them.

We cannot conclude the discussion of this petition without calling the Court's attention to pages 21 and 22 thereof. Many of the statements contained on those pages are as purely surmise and conjecture as can well

be imagined, and though they are of no importance, they are absolutely without support in the Record. Mr. Brevillier constantly insists that Hawley "wanted mineral land." How he knows that, and what possible effect it can have on this case, we do not know.

The Petition of Joseph E. and Lucia J. Wise.

Adverse Possession:

The petition of the Wises is based entirely upon the question of adverse possession. Their counsel contends that this Court did not pass on that question, despite the fact that he assigned it as error, that it was argued at length in the briefs, and despite the Court's statement on the last page of their opinion that—

> "The other points made by counsel have been carefully considered, but we do not think they require special mention."

Furthermore, this contention is made directly in the face of the fact that the lower court specifically decreed that no adverse possession could be initiated by any of the parties to the suit prior to December 14, 1914, and this Court affirmed that decree without any alteration of that paragraph.

But even at the risk of uselessly repeating our former arguments, we take the liberty of adding something to what we have already said on the question of adverse possession.

(1) *The land in controversy was segregated from the public domain on or about December* 14, 1914.

We do not think that this statement will admit of serious question. The decree of the Supreme Court of the United States, in the case of *Lane* v. *Watts*, ordered (Record, p. 411) the Secretary of the Interior and the Commissioner of the General Land Office to place the Contzen Survey on file "for the purpose of defining the outboundaries of said lands and segregating the same from the public lands of the United States." It will be seen that the Court ordered this survey placed on file for a certain *purpose,* namely, to define the outboundaries of the land and to segregate it from the public domain. Consequently it can not be contended that the land had been segregated, or the outboundaries thereof defined, before that survey was placed on file in accordance with the decree.

The plaintiffs' "Exhibit R" (Record, p. 193) is a certified copy of a letter from the Assistant Commissioner to the Secretary of the Interior, dated December 14, 1914, stating that in compliance with the letter of December 2, 1914, the Contzen Survey, with the accompanying field notes, had been filed and transmitted to the local land office. Thus, the decree of the Court was executed, the outboundaries of the land defined, and the land was segregated from the public domain.

(2) *No adverse possession could be maintained by any party to this suit prior to the time the land was segregated from the public domain.*

Until the land in controversy was segregated from the public domain the grant claimants had no definite means of ascertaining the extent of their possessions and were without right to relief in ejectment; and until such a right to relief in ejectment was given them, no person could claim any rights by adverse possession against them.

The Supreme Court of the United States said in their opinion in the case of *Lane* v. *Watts* that they agreed with the lower courts that a survey was necessary to segregate this land from the public domain. They cited the case of *Stoneroad* v. *Stoneroad*, 158 U. S., 240. That case involved the Preston Beck Grant, also confirmed by the Act of June 21, 1860. The plaintiff brought a suit in ejectment against the defendant involving land which was outside the limit of the grant as surveyed by the United States, but inside the limit of the designated boundaries of the grant under which the plaintiff claimed; that is, it was inside the limit of the boundaries as they were described in the grant to the claimant by the King of Spain. The Supreme Court held that the survey was conclusive evidence of the location of the grant, and that plaintiff could not maintain an action of ejectment for any land not included in the survey, even though it was included within the boundaries of the original grant. They say, on page 247:

> "We think the confirmatory act of 1860, by necessary implication, contemplated that the confirmed grant should be thereafter surveyed, and that such survey was essential for the purpose of definitely

segregating the land, to which the right was confirmed, from the public domain, and thus finally fixing the extent of the rights of the owners of the grant. To hold otherwise would be to conclude that Congress had confirmed the claim and yet deprived the claimant of all definite means of ascertaining the extent of his possessions under the confirmed title."

On page 251 they say:

"As we have seen, a survey was necessary. Now, if the survey was illegal, and is to be treated as not existing, then we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant. In other words, *if it be conceded that there is no survey, the plaintiff is without right to relief,* since a survey was essential to carry out the confirmatory act."

We think that case conclusive here. Paraphrasing the language of that opinion, until Baca Float No. 3 was segregated from the public domain the grant claimants had no means of ascertaining the extent of their possessions under the confirmed title, *and were without right to relief in ejectment,* since the survey was necessary to carry out the confirmatory act of June 21, 1860.

A few practical observations as to the reason for the rules above laid down may not be amiss. Until the survey, in such cases as these, is placed on file the grant

claimant has no muniment of his title. He is in the position of a man who owns land, but has no deed and no way of showing that he does own it. The decree in *Lane* v. *Watts* also required the Commissioner and Secretary of the Interior to place the Contzen Survey on file "as muniment of the title which passed to the heirs of said Baca." The Contzen Survey, approved and filed, is the muniment fo the title of the grant claimants.

Until land is segregated from the public domain there can be no means of proving whether any particular parcel of land is within or without the limits of the grant. In the event that the grant claimants bring an action of ejectment, the defendant can answer and make them prove that the land which he claims is within the limits of their grant. Without a survey and consequent segregation, the plaintiff would be "without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant," and consequently the action must fail.

Conclusion.

Since the commencement of this case more than forty thousand dollars in taxes has been assessed against this land. These taxes we must pay, though we have not had the use or enjoyment of the land during that period. There are many squatters on the land who are committing the grossest kinds of waste. They are cutting down trees and misusing the land in every possible way. We cannot well dispose of them until this case is ended.

In the interests of justice we, the owners of the land, earnestly ask the Court to put an end to this litigation. For fifty years the Government kept the true owners out of possession. Our present opponents have pursued us for years with what we consider to be nothing more than a mere "nuisance" title. They have cost us a fortune and they now seek to prolong this contest still further.

We have read the brief submitted on behalf of Messrs. Watts and Davis, therefore will not further elaborate this brief.

For the reasons given in this brief, we respectfully pray the Court not to grant a rehearing in this case, or to certify any of the questions in the case to the Supreme Court of the United States.

Respectfully submitted,

JOSEPH W. BAILEY,
WELDON M. BAILEY,
Counsel for Bouldin
Appellants and Appellees.

No. 2720

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALASKA SALMON COMPANY, a Corporation,
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

Transcript of Record.

Upon Writ of Error to and Upon Appeal from the United States District Court of the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2720

United States

Circuit Court of Appeals

For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court for the Territory of Alaska, Division Number One. at Juneau.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA SALMON COMPANY,
Defendant.

Defendant's Request for Conclusions of Law and Judgment.

Upon the agreed statement of facts filed herein by the parties to this suit, which said statement the Court adopts its findings of fact, the Court doth conclude as a matter of law:

Conclusion No. One.

That sections six and nine of the act of April 29, 1915, under which this suit is prosecuted, are void and invalid for the reasons:

(A) That the sections of said act above mentioned alter, modify and repeal the act of June 26, 1906, which said act of June 26, 1906, is set forth in paragraph VI of the agreed statement of facts;

(B) Because under the act of August 24, 1912, which said act is set forth in paragraph IV of the

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*Page-number appearing at foot of page of original certified Record.

agreed statement of facts, the legislative assembly in the Territory of Alaska is prohibited from passing any laws relating to fish or fisheries in the Territory of Alaska;

(C) Because no assessment whatsoever was made upon the property of defendant, taxed under the act of April 29, 1915, prior [1a] to the levying of the tax.

Refused. R. W. J.

Conclusion No. Two.

The defendant company is not liable for any license taxes for the years 1913–1914, for the reason that the act of May 1, 1913, designated as House Bill No. 96, did not provide for any civil liability.

Refused. R. W. J.

Conclusion No. Three.

That the defendant, Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska, approved May 1, 1913.

Refused. R. W. J.

Conclusion No. Four.

That the defendant, Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the act of the Alaska legislature, approved April 29, 1915.

Refused. R. W. J.

Conclusion No. Five.

That the owners of private salmon hatcheries in Alaska, who are also engaged in the business of canning salmon in Alaska, are by virtue of certificates issued to them by the Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled, by virtue of such certificates, to have the same applied *pro tanto*, in payment of all license fees and [2] charges, not only imposed by the said acts of Congress, but also by said acts of the legislature of Alaska.

Refused. R. W. J.

Conclusion No. Six.

Upon the agreed statement of facts, the Court doth fined that the plaintiff is not entitled to any relief in this action, and that defendant is entitled to its costs and disbursements herein expended.

Refused. R. W. J.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 15, 1915. J. W. Bell, Clerk. By ————, Deputy. [3]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1407—A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA SALMON COMPANY,
Defendant.

Judgment.

This cause came on regularly to be heard upon the agreed statement of facts filed herein and was submitted to the Court under the provisions of chapter 28 of the Code of Civil Procedure of the district of Alaska, Mr. J. H. Cobb appearing for the plaintiff, and Mr. Z. R. Cheney for defendant. And the Court having heard said agreed statement of facts and fully considered the same, the Court concludes as a matter of law:

I.

That compliance with all the conditions and the payment of the license fees imposed by the acts of Congress set forth in the agreed statement, does not relieve the defendant from the payment of the license taxes imposed by the act of the Alaska legislature approved May 1st, 1913, but that the defendant was obliged to apply for a license and pay the license fees and taxes so imposed.

II.

That the defendant having complied with all the conditions and paid the license fees imposed by the acts of Congress in said agreed statement set forth, is obliged to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska [4] known as House Bill No. 109 approved April 29th, 1915.

IT IS THEREFORE CONSIDERED BY THE COURT, and so ordered and adjudged that the plaintiff, the Territory of Alaska do have and recover of and from the defendant the Alaska Salmon Company for the taxes for the year 1915, the amount set

forth in the tenth paragraph of said agreed statement, to wit: Twelve Hundred and Ninety and 03/100 Dollars ($1,290.03) with interest thereon at the rate of eight per cent per annum from and after January 15th, 1916.

IT IS FURTHER CONSIDERED BY THE COURT and so ordered and adjudged that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant, the Alaska Salmon Company, a corporation, for taxes for the years 1913 and 1914, the sum of Four Thousand Six Hundred and Forty-three and 60/100 Dollars ($4,643.60) being the amount set forth in paragraph four of said statement, as the second cause of action, together with interest thereon from the date hereof at the rate of eight per cent per annum.

AND IT IS FURTHER CONSIDERED BY THE COURT and so ordered and adjudged that the plaintiff do have and recover of the defendant its costs herein to be taxed by the clerk, and execution may issue for all said amounts so recovered.

Done in open court this the 22d day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division, Dec. 14, 1915. J. W. Bell, Clerk. By ————, Deputy. [5]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1074—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Assignment of Errors.

Comes now the Alaska Salmon Company, defendant above named and plaintiff in error, by its attorney, Z. R. Cheney, and assigns the following errors commited by the Court in adopting its conclusions of law, and in the rendition of the judgment in this cause, upon which errors it will rely in the Appellate Court:

Assignment of Error No. One.

The Court erred in refusing to adopt defendant's requested conclusion of law number one, reading as follows:

That sections six and nine of the act of April 29, 1915, under which this suit is prosecuted, are void and invalid for the reasons:

(A) That the sections of said act above mentioned alter, modify, and repeal the act of June 26, 1906, which said act of June 26, 1906, is set forth in paragraph VI of the agreed statement of facts;

(B) Because under the act of August 24, 1912, which said act is set forth in paragraph IV of the agreed statement of facts, the legislative assembly in

the territory of Alaska is prohibited from passing any laws relating to fish or fisheries in the Territory of Alaska; [6]

(C) Because no assessment whatsoever was made upon the property of defendant, taxed under the act of April 29, 1915, prior to the levying of the tax.

Assignment of Error No. Two.

The Court erred in refusing to adopt defendant's requested conclusion of law number two, reading as follows:

The defendant company is not liable for any license taxes for the years 1913–1914, for the reason that the act of May 1, 1913, designated as House Bill No. 96, did not provide for any civil liability.

Assignment of Error No. Three.

The Court erred in refusing to adopt defendant's requested conclusion of law number three, reading as follows:

That the defendant, Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska, approved May 1, 1913.

Assignment of Error No. Four.

The Court erred in refusing to adopt defendant's requested conclusion of law number four, reading as follows:

That the defendant, Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is not required to apply for a license and pay the license

fees and taxes imposed by the act of the Alaska legislature, approved April 29, 1915. [7]

Assignment of Error No. Five.

The Court erred in refusing to adopt defendant's requested conclusion of law number five, reading as follows:

That the owners of private salmon hatcheries in Alaska, who are also engaged in the business of canning salmon in Alaska, are by virtue of certificates issued to them by the Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled, by virtue of such certificates, to have the same applied *pro tanto,* in payment of all license fees and charges, not only imposed by the said acts of Congress, but also by said acts of the legislature of Alaska.

Assignment of Error No. Six.

The Court erred in refusing to adopt defendant's requested conclusion of law number six, reading as follows:

Upon the agreed statement of facts, the Court doth find that the plaintiff is not entitled to any relief in this action, and that defendant is entitled to its costs and disbursements herein expended.

Assignment of Error No. Seven.

The Court erred in adopting conclusion of law number one, reading as follows:

That compliance with all the conditions and the payment of the license fees imposed by the acts of Congress set forth in the agreed statement, does not relieve the defendant from the payment of the license taxes imposed by the act of the Alaska legislature

approved May 1st, 1913, but that the defendant was obliged to apply for a license and pay the license fees and taxes so imposed. [8]

Assignment of Error No. Eight.

The Court erred in adopting conclusion of law number Two, reading as follows:

That the defendant having complied with all the conditions and paid the license fees imposed by the acts of Congress in said agreed statement set forth, is obliged to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska known as House Bill No. 109 approved April 29th, 1915.

Assignment of Error No. Nine.

The Court erred in rendering and entering judgment for the plaintiff, reading as follows:

IT IS THEREFORE CONSIDERED BY THE COURT, and so ordered and adjudged that the plaintiff, the Territory of Alaska do have and recover of and from the defendant the Alaska Salmon Company for the taxes for the year 1915 the amount set forth in the tenth paragraph of said agreed statement, to wit: Twelve Hundred and Ninety and 03/100 Dollars ($1,290.03) with interest thereon at the rate of eight per cent per annum from and after January 15th, 1915.

IT IS FURTHER CONSIDERED BY THE COURT and so ordered and adjudged that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant, the Alaska Salmon Company, a corporation, for taxes for the years 1913 and 1914, the sum of Four Thousand Six Hundred and

Forty-three and 60/100 Dollars ($4,643.60) being the amount set forth in paragraph four of said statement, as the second cause of action, together with interest thereon from the date hereof at the rate of eight per cent per annum. [9]

AND IT IS FURTHER CONSIDERED BY THE COURT and so ordered and adjudged that the plaintiff do have and recover of the defendant it's costs herein to be taxed by the clerk, and execution may issue for all said amounts so recovered.

Done in open court this the 22 day of December, 1915.

ROBERT W. JENNINGS,
Judge.

And for the said errors and others manifest of record herein, defendant and plaintiff in error prays that the said judgment be reversed and judgment be given for defendant and plaintiff in error, and for such other orders as to the Court may seem meet and proper in the premises.

Z. R. CHENEY,
Attorney for Alaska Salmon Company, Defendant and Plaintiff in Error.

Filed in the District Court, District of Alaska, First Division. Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. [10]

COPY.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Petition for Appeal.

The Alaska Salmon Company, defendant and appellant in the above-entitled cause, conceiving itself aggrieved by the judgment and decree made and entered on the 22d day of December, 1915, in the above-entitled cause, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and prays this its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree were made and based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment and decree may be reversed or modified, and speedy justice done in the premises.

Z. R. CHENEY,

Attorney for Alaska Salmon Company, Defendant and Appellant.

Filed in the District Court, District of Alaska,

First Division, Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. **[11]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Order Allowing Appeal and Fixing Amount of Bond.

This matter coming on to be heard in open court this 23 day of December, 1915, upon the petition of the defendant and appellant for an order allowing an appeal in the above-entitled cause, defendant and appellant being represented by its attorney, Z. R. Cheney, and it appearing to the Court that the petitioner has made and duly filed its assignment of errors herein, and said petition being in due form, it is ordered that the appeal herein be and the same is allowed as prayed for.

It is further ordered that the defendant and appellant file a bond on appeal in the sum of Six Thousand Dollars ($6,000.00), such bond, when taken and approved, to operate as a supersedeas from and after the date of its filing.

Done in open court this 23d day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division Dec. 23, 1915. J. W. Bell, Clerk. By ———— Deputy. **[12]**

COPY.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Petition for Writ of Error.

The Alaska Salmon Company, defendant in the above-entitled cause, feeling itself aggrieved by the conclusions of law adopted by the Court and by the judgment entered against the defendant on the 22d day of December, 1915, in the above-entitled cause, comes now by its attorney, Z. R. Cheney, and petitions said Court for an order allowing the defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of

said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Z. R. CHENEY,
Attorney for defendant.

Filed in the District Court, District of Adaska, First Division, Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. **[13]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Order Allowing Writ of Error, and Fixing Amount of Supersedeas Bond.

At a stated time, to wit, on the 23 day of December, 1915, at a regular session of the District Court, held in the courtroom, in the city of Juneau, in said Territory, on said day. Present: The Honorable ROBERT W. JENNINGS, District Judge.

Upon motion of Z. R. Cheney, attorney for defendant, based upon petition for writ of error and an assignment of errors heretofore duly filed herein, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judg-

ment heretofore entered herein and herein filed on the 22d day of December, 1915.

It is further ordered that the defendant file a bond in the sum of Six Thousand Dollars ($6,000.00) such bond, when taken and approved by this Court and filed herein, to operate as a supersedeas from and after the date of such filing.

Done in open court this 23d day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division, Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. **[14]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA SALMON COMPANY,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable Judge of the District Court for the Territory of Alaska, Division Number One: Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the District Court before you between the Territory of Alaska, plaintiff, vs. Alaska Salmon Company, defendant, wherein was drawn in question the validity of certain statutes of the Territory of Alaska, being chapter 52 of the Session Laws of Alaska of 1913, approved May 1, 1913, and chapter 76 of the Session Laws of Alaska of 1915, approved April 29, 1915, and wherein the decision was in favor of the validity of said acts, a manifest error hath happened to the great prejudice and damage of the said defendant, Alaska Salmon Company, as is said and appears by the petition herein;

Now, Therefore, we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, [15] so as to have the same at the said place in said circuit on or before thirty days, from the date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, which of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court

of the United States, this 23 day of December, 1915.

I attest my hand and the seal of the District Court for Alaska, Division Number One, at the Clerk's office at Juneau, Alaska, on the day and year last above written.

[Seal] J. W. BELL,
Clerk of the District Court for the Territory of Alaska.

By ————————,
Deputy.

Allowed this 23 day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division, Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. **[16]**

———

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA SALMON COMPANY,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to theTerritory of Alaska, Plaintiff, and to J. H. Cobb, its Chief Counsel, Greeting:

You are herby cited and admonished to be and ap-

pear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for Alaska, Division Number One, wherein the Alaska Salmon Company is plaintiff, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 23d day of December, 1915, and of the independence of the United States the one hundred and thirty-ninth.

ROBERT W. JENNINGS,
Judge.

Copy received and service accepted, this 23d day of December, 1915.

J. H. COBB,
Chief Counsel for the Territory of Alaska.

Filed in the District Court, District of Alaska, First Division, Dec. 23, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. **[17]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Stipulation [That Defendant may File Supersedeas Bond on Appeal Within 40 Days from Dec. 22, 1915, etc.].

It is hereby stipulated and agreed between J. H. Cobb, Chief Counsel for the Territory of Alaska, plaintiff, and Z. R. Cheney, attorney for defendant, that the defendant may file in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, at any time, within forty days from this date, a supersedeas bond on appeal, in the sum of Six Thousand Dollars ($6,000) in pursuance of the order of Robert W. Jennings, Judge of the District Court for the Territory of Alaska, Division Number One, which said order was made and filed in said District Court on the 23d day of December, 1915; that in the meantime and until the filing of such bond, all proceedings on the part of the plaintiff under the judgment made and entered in this cause on the 22d day of December, 1915, be stayed.

J. H. COBB,
Attorney for Plaintiff.
Z. R. CHENEY,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division, Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. [18]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Defendant's Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on for trial, before Honorable Robert W. Jennings, Judge of the above-entitled court, on December 14, 1915, plaintiff being represented by Mr. J. H. Cobb, Chief Counsel for the Territory of Alaska, and defendant being represented by its attorney, Mr. Z. R. Cheney. The cause was submitted upon an agreed statement of facts filed by the parties pursuant to the provisions of chapter 28 of the Code of Civil Procedure for the District of Alaska, which statement of facts is in words and figures as follows, to wit: [19]

In the United States District Court, Territory of Alaska, First Division.

No. 1407—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

Agreed Statement of Facts and Stipulation to Submit a Controversy Without Action.

Whereas a question in controversy has arisen between the Territory of Alaska, plaintiff, and the Alaska Salmon Company, defendant, as to the necessity of the defendant making application for, and obtaining, a license to prosecute the business of operating a salmon cannery in the Territory of Alaska, for maintaining fish-traps and using gill-nets, and paying for said licenses the amounts hereinafter stated, which question in controversy might become the subject of an action or actions in the courts of the District of Alaska, and the parties hereto have agreed to submit the same to the determination of the Court without action, under the provisions of chapter 28 of the Code of Civil Procedure of the District of Alaska, and have agreed to the following statement of facts upon which the said controversy shall be submitted to this court. **[20]**

I.

That the defendant is, and ever since the 14th day of November, 1900, has been, a corporation duly incorporated, organized and existing under and by

virtue of the laws of the State of California, and, with the exception of the year 1909, has ever since the year 1901 been engaged in the business of annually operating a salmon cannery situate on the Nushagak River, in the District of Alaska, and manufacturing canned salmon thereat.

II.

That the said defendant, during the year 1915, also packed at its said cannery in Alaska, the following cases of salmon, to wit:

Of King and Red salmon.....27,669 Cases
Of Medium Red salmon..... 616 Cases
Of all other salmon..... 3,920 Cases

That the amount in controversy herein exceeds the sum of Five Hundred (500) Dollars in United States Gold Coin.

III.

That the said defendant, during the year 1915, also maintained and operated at its said cannery at Alaska gill-nets, aggregating 13,175 fathoms in length.

IV.

That on the 24th day of August, 1912, the Congress of the United States duly enacted a law for the creation of a legislative assembly for the Territory of Alaska, which law is hereinafter referred to as the Organic Act, and is as follows, to wit: [21]

"An Act to Create a Legislative Assembly in the Territory of Alaska, to Confer Legislative Power Thereon, and for Other Purposes.

(Act of August 24, 1912, ch. 387.)

Sec. 1. Alaska Territory organized.—That the

territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws.

Sec. 2. Capital at Juneau.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

Sec. 3. Constitution and laws of United States extended.—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature; Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and mainten-

ance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses. And the legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of District Courts of the United States.

Sec. 4. The legislature.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a Senate and a House of Representatives. The Senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress; each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the Senate shall be four years: Provided, That immediately after they shall be assembled in consequence of the first election [22] they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so that one member of the Senate shall, after the first elec-

tion, be elected biennially at the regular election from each division. The House of Representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications as are prescribed for members of the Senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: Provided, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route.

Sec. 5. Election of members of the legislature.—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the

appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled 'An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska,' approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of election to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.

Sec. 6. Convening and sessions of legislature.—That the Legislature of Alaska shall convene at the capital at the City of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof [23] and give at least thirty days' written notice to each member of said

legislature, and in such case shall not continue in session longer than fifteen days. The governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the United States, or when any public danger or necessity may require it.

Sec. 7. Organization of the legislature.—That when the legislature shall convene under the law, the Senate and House of Representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the Senate as 'president of the Senate' and in the case of the House of Representatives as 'speaker of the House of Representaives,' and by the election by each body of the subordinate officers provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: Provided, that no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation made by Congress.

Sec. 8. Enacting clause—Subject of act.—That the enacting clause of all laws passed by the legislature shall be 'Be it enacted by the Legislature of the Territory of Alaska.' No law shall embrace more than one subject, which shall be expressed in its title.

Sec. 9. Legislative power — Limitations.—The legislative power of the Territory shall extend to all rightful subjects of legislation but not inconsistent

with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have re-

sided in the Territory [24] for two years next preceding the application, which residence and all causes for divorce shall be determined by the Court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or any constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual

running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness; Provided, That all authorized indebtedness shall be paid in the order of its creation; all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purpoes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year; Provided, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void: Provided further, That nothing herein contained shall be held to abridge the right of the legis-

lature to modify the qualifications of electors by extending the elective franchise to women.

Sec. 10. Rules, quorums, and majority.—That the Senate and House of Representatives shall each choose its own officers, determine the rules of its own proceedings not inconsistent with this Act; and keep a journal of its proceedings; that the ayes [25] and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attendance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present.

Sec. 11. Legislator shall not hold other office.—That no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

Sec. 12. Exemptions of legislators.—That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the

exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same; Provided, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way.

Sec. 13. Passage of laws.—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.

Sec. 14. The veto power.—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objec-

tions, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider [26] such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns *sine die* prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.

Sec. 15. Payment of legislative expenses.—That there shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which

the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

Sec. 16. Laws transmitted to President and printed.—That the governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States, and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory.

Sec. 17. Election of Delegates.—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by 'An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska,' approved May seventh, nineteen hundred and six, shall be held on the Tuesday next after the first Monday in November in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and

shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: Provided, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity or a person elected, may be [27] prescribed by an act passed by the Legislature of the Territory of Alaska: Provided, further, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.

Sec. 18. Creating railroad commission.—That an officer of the Engineer Corps of the United States Army, a geologist in charge of Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commission hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter

as may be practicable, together with their conclusions and recommendations in respect to the best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States; Provided further, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission.

Sec. 19. Laws relating to Alaska (compilation to be made). That the Committee on Territories of the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of Five Thousand Dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairman of said committees.

Ses. 20. Laws shall be submitted to Congress.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect."

That subsequent to the passage of the said Organic

Act, and on, to wit, January 5, 1914, it was decided by the United States Circuit Court of Appeals for the Ninth Circuit, in the two actions of Callahan vs. Marshall and Callahan vs. United States, [28] being cases numbered 2305 and 2308, respectively, on the records of said court, that the act of the legislature of the Territory of Alaska purporting to impose a poll tax upon male persons in the Territory of Alaska and providing means for its collection, which said act is known and designated as chapter 54 of the Sessions Laws of Alaska for the year 1913, was invalid for reasons set forth in the opinion of said Court, which said opinion is reported in volume 210 of the Federal Reporter at page 230 et seq., and to which opinion specific reference is hereby made.

That the aforesaid Organic Act, ever since its enactment has been, and now is, in full force and effect, save that by act of Congress, under date of August 29, 1914, and subsequent to the rendition of the aforesaid opinion by the Circuit Court of Appeals, Congress enacted the following law:

"An Act to Amend an Act entitled 'An Act creating a legislative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes,' approved August twenty-fourth, nineteen hundred and twelve.

(Power of courts to enforce statutes—Legislative power—costs of prosecutions.) That nothing in that Act of Congress entitled 'An Act creating a legislative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes,' approved August twenty-fourth, nineteen

hundred and twelve, shall be so construed as to prevent the courts now existing or that may be hereafter created in said Territory from enforcing within their respective jurisdictions all laws passed by the legislature within the power conferred upon it, the same as if such laws were passed by Congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States commissioners acting as justices of the peace, judges of probate courts, recorders, and coroners, and providing the necessary expenses of performing such duties, and in the prosecuting of all crimes denounced by Territorial laws the costs shall be paid the same as is now or may hereafter be provided by Act of Congress providing for the prosecution of criminal offenses in said Territory, except that in prosecutions growing out of any revenue law passed by the legislature the costs shall be paid as in civil actions and such prosecutions shall be in the name of the Territory." [29]

V.

That by Act approved April 29, 1915, the Legislature of the Territory of Alaska enacted a law designated as House Bill No. 109, which is as follows, to wit:

"CHAPTER 76.

(House Bill No. 109.)

AN ACT to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to

amend an Act entitled 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,' approved May 1, 1913, and declaring an emergency.

Be it Enacted by the Legislature of the Territory of Alaska:

Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows:

1st. Attorneys at Law, Doctors and Dentists: Ten Dollars per annum.

2d. Automobiles: Five dollars per annum.

3d. Bakeries: Fifteen dollars per annum.

4th. Electric Light and Power Plants selling light and power to the public: One-half of 1 per cent of the gross receipts in excess of twenty-five hundred dollars.

5th. Employment Agencies: Operating for hire and collecting a fee from employees, five hundred dollars per annum.

6th. Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents per case on Medium Reds; one cent per case on all others.

7th. Salteries: Two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring.

8th. Fish Traps: Fixed or floating, one hundred dollars per annum, So called dummy traps included.

9th. Gill Nets: One dollar per hundred fathoms or fraction thereof.

10th. Cold Storage Fish Plants: Doing a business of one hundred thousand dollars per annum or more, five [30] hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, and less than one hundred thousand dollars, three hundred and seventy-five dollars per annum; doing a business of fifty thousand and less than seventy-five thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand and less than fifty thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars and less than twenty-five thousand dollars per annum, fifty dollars per annum; doing a business of four thousand, and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The 'Annual Business' under this section shall be considered the amount paid per annum for the product.

11th. Laundries: Doing a business of over five thousand dollars per annum, twenty-five dollars per annum.

12th. Meat Markets: Doing a business of not less than ten thousand nor more than twenty-five thousand dollars per annum, ten dollars per annum; doing a business of not less than twenty-five thousand nor more than fifty thousand dollars per annum, thirty dollars; doing a business of not less than fifty thousand nor more than seventy-five thousand

dollars per annum, one hundred dollars per annum; doing a business of not less than seventy-five thousand nor more than two hundred thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of over two hundred thousand dollars per annum, five hundred dollars per annum. That every separate meat market or establishment shall be considered a separate business.

13th. Mining: One per cent of the net income in excess of five thousand dollars. By 'net income' is meant the cash value of the output of the mine less operating expenses, repairs and betterments actually done. By 'mining' is meant any operation by which valuable metals, ores, minerals or marketable stone is extracted from the earth.

14th. Public Scavengers: Fifty ($50.00) dollars per annum.

15th. Ships and Shipping: Freight and Transportation: Ocean and coast-wise vessels doing business for hire plying in Alaska waters, registered in Alaska and not registered elsewhere in the United States and not paying a tax or license elsewhere, and freight and passenger lines propelled by mechanical power registered in the Territory of Alaska and not paying a license or tax elsewhere in the United States, and river and lake steamers and barges, as well as transportation lines doing business wholly within the Territory of Alaska, one dollar per ton on net tonnage, custom house measurement of such vessel.

16th. Telephone Companies: One-half of one per cent of gross receipts in excess of Fifteen ($1,500.00) Hundred Dollars. **[31]**

17th. Water Works: Selling water or power to the public, one-half of one per cent of gross receipts in excess of Twenty-five ($2500.00) Hundred Dollars.

18th. Public Messengers: Twenty-five ($25.00) Dollars per annum.

Section 2. Every person, firm or corporation desiring to engage in any of the lines of business specified in Section One, shall first apply to and obtain from the Territorial Treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application. If the amount of the tax is not a fixed sum, the applicant shall state in his application that he agrees to pay the license tax, and will make a true return and will pay to the Treasurer such tax on or before the 15th day of the next ensuing January. The applicant shall also state the name of the person, firm or corporation making the application, the line of business to be licensed, and the place where said business will be carried on. Upon the receipt of the application in proper form, the Treasurer shall issue the license as of the date of the application, and the applicant may carry on the business from and after the date the application is actually made. All license taxes, except those where the tax is a fixed one, shall be due and payable on December 31st of each year, and must be paid on or before January 15th following. And it shall be the duty of the person, firm or corporation engaged in any of said lines of business, to make a return under oath, to the Treasurer on or before January 15th of

each year, setting forth the name of the license, the number of the license, and all the facts regarding the buisness, necessary to enable the Treasurer to determine the amount of the tax to be paid. And all application for renewals of such licenses shall be made on or before January 15th of the calendar year for which such renewal is made.

Provided: Any person, firm or corporation now engaged in any of the lines of business specified in Section one shall comply with this Act on or before July 1st, 1915, by applying for the license (and paying the tax if a fixed sum) for the calendar year ending December 31st, 1915, and all taxes for the current year shall be calculated for the year beginning January 1st, and ending December 31st, 1915.

Any person, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent added, for which the defendant was liable. Each month or fraction of a month in which business is carried on in violation of this Act shall be deemed a separate offense, and prosecution therefor may be by information filed by the Attorney-General or other authorized legal counsel of the Territory in any Court of competent jurisdiction, and upon conviction the Court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil actions or by imprisonment at the rate of one day for each two dollars of such fine and costs. [32]

PROVIDED: That in any prosecution hereunder the Attorney-General or other authorized legal

counsel of the Territory may, with the consent of the Governor, compromise the case by accepting from the defendant a sum not less than the tax, legal interest thereon and all costs and expenses.

The Territorial Treasurer is authorized and directed to prescribe suitable forms for applications, licenses, returns and such other forms as may be necessary or proper to carry this law into effect. He shall distribute such forms to the public through the Clerks' of the Court and Marshal's offices in the several Divisions for use of those subject to the taxes herein laid.

Section 3. It shall be the duty of the Attorney-General or other authorized legal counsel of the Territory to enforce the provisions of this Act; and for that purpose may with the approval of the Governor, employ such assistants as he may deem necessary, but the compensation for the services of such assistants shall be paid out of the fund recovered, and the Territory shall not be liable therefor in any event beyond fifteen (15) per cent of the amount so recovered in each case; assistant counsel may, however, be employed at a previously agreed upon and stipulated fixed fee.

Section 4. Special remedies provided by this Act, or other Acts of the Legislature shall not be deemed exclusive, and any appropriate remedy either civil or criminal or both, may be invoked by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions.

Section 5. All taxes levied, laid or provided for

in this Act and penalties and interest accrued, are hereby declared to be a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments.

Section 6. It shall be the duty of the United States Marshals and Deputy Marshals in the Territory of Alaska to enforce the provisions of this Act in their respective precincts, districts or divisions and to report all violations thereof to the Governor, and under his direction file information, or take such proceedings as he may direct; and for the services so performed they shall be paid under the provisions of Section three hereof. And for all negligence or wilful failure to perform such duties, Marshals and Deputy Marshals shall be liable to the Territory for all losses sustained, which liabilities may be enforced in any appropriate proceeding. And in the enforcement of this Act the Attorney-General or other legal counsel for the Territory and the Marshals and Deputy Marshals have the right to inspect the premises and all books and papers of the persons, firms or corporations claimed to be liable to the taxes herein laid, which right of inspection shall be enforced by the Courts upon application therefor. [33]

Section 7. The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the Act of

which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced.

Section 8. An emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

VI.

That on June 26, 1906, the Congress of the United States duly enacted a law, *and* which is as follows, to wit:

"An Act for the Protection and Regulation of the Fisheries of Alaska.

Be it enacted, etc., That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the Act of March third, eighteen hundred and ninety-nine, entitled 'An Act to define and punish crimes in the district of Alaska, and to provide a

code of criminal procedure for the district,' and amendments thereto.

Sec. 2. That the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries operated in Alaska shall be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand red or king salmon fry liberated, upon the following conditions:

That the Secretary of Commerce and Labor may from time to time, and on the application of the hatchery owner shall, within a reasonable time thereafter, cause such private hatcheries to be inspected for the purpose of determining the character of their operations, efficiency, and productiveness, and if he approve the same shall cause notice of such approval to be filed in the office of the clerk or deputy clerk of the United States district court of the Division of the district of Alaska wherein any such hatchery is located, and shall also notify the owners of such hatchery of the action taken by him. The owner, [34] agent, officer, or superintendent of any hatchery the effectiveness and productiveness of which has been approved as above provided shall, between the thirtieth day of June and the thirty-first day of December of each year, make proof of the number of salmon fry liberated during the twelve months immediately preceding the thirtieth day of June, by a written statement under oath. Such proof shall be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein such

hatchery is located, and when so filed shall entitle the respective hatchery owners to the exemption as herein provided; and a false oath as to the number of salmon fry liberated shall be deemed perjury and subject the offender to all the pains and penalties thereof. Duplicates of such statements shall also be filed with the Secretary of Commerce and Labor. It shall be the duty of such clerk or deputy clerk in whose office the approval and proof heretofore provided for are filed to forthwith issue to the hatchery owner, causing such proofs to be filed, certificates which shall not be transferable and of such denominations as said owner may request (no certificate to cover fewer than one thousand fry), covering in the aggregate the number of fry so proved to have been liberated; and such certificates may be used at any time by the person, company, corporation, or association to whom issued for the payment *pro tanto* of any license fees or taxes upon or against or on account of any catch or pack of salmon made by them in Alaska; and it shall be the duty of all public officials charged with the duty of collecting or receiving such license fees or taxes to accept such certificates in lieu of money in payment of all license fees or taxes upon or against the pack of canned salmon at the ratio of one thousand fry for each ten cases of salmon. No hatchery owner shall obtain the rebate from the output of any hatchery to which he might otherwise be entitled under this Act unless the efficiency of said hatchery has first been approved by the Secretary of Commerce and Labor in the manner herein provided for.

Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel,. or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed.

Sec. 4. That it shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance, for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing [35] appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.

Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock post meridian of Saturday of each week until six o'clock antemeridian of the Monday following, or to fish for, or catch, or kill in any manner or by any appliances except by rod, spear, or gaff, any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. Throughout the weekly close season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

Sec. 6. That the Secretary of Commerce and Labor may, in his discretion, set aside any stream or lakes as preserves for spawning grounds, in which fishing may be limited or entirely prohibited; and when, in his judgment, the results of fishing operations in any stream, or off the mouth thereof, indicate that the number of salmon taken is larger than the natural production of salmon in such stream, he is authorized to establish close seasons or to limit or prohibit fishing entirely for one year or more within such stream or within five hundred yards of

the mouth thereof, so as to permit salmon to increase: Provided, however, That such power shall be exercised only after all persons interested shall be given a hearing, of which due notice must be given by publication; and where the interested parties are known to the Department they shall be personally notified by a notice mailed not less than thirty days previous to such hearing. No order made under this section shall be effective before the next calendar year after same is made: And provided further, That such limitations and prohibitions shall not apply to those engaged in catching salmon who keep such streams fully stocked with salmon by artificial propagation.

Sec. 7. That is shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed.

Sec. 8. That it shall be unlawful for any person, company, or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska.

Sec. 9. That it shall be unlawful for any person, company or corporation canning, salting, or curing fish of any species in Alaska to use any label, brand, or trade-mark which shall tend to misrepresent the contents of any package of fish offered [36] for sale: Provided, That the use of the terms 'red, 'medium red,' 'pink,' 'chum,' and so forth, as applied to the various species of Pacific salmon under present trade usages shall not be deemed in conflict with the provisions of this Act when used to designate salmon of those known species.

Sec. 10. That every person, company, and corporation engaged in catching, curing, or in any manner utilizing fishery products, or in operating fish hatcheries in Alaska, shall make detailed annual reports thereof to the Secretary of Commerce and Labor, on blanks furnished by him, covering all such facts as may be required with respect thereto for the information of the Department. Such reports shall be sworn to by the superintendent, manager or other person having knowledge of the facts, a separate blank form being used for each establishment in cases where more than one cannery, saltery, or other establishment is conducted by a person, company, or corporation, and the same shall be forwarded to the Department at the close of the fishing season and not later than December fifteenth of each year.

Sec. 11. That the catching or killing, except with rod, spear, or gaff, of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions of this Act, and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this Act.

Sec. 12. That to enforce the provisions of this Act and such regulations as he may establish in pursuance thereof, the Secretary of Commerce and Labor is authorized and directed to depute, in addition to the agent and assistant agent of salmon fisheries now provided by law, from the officers and employees of the Department of Commerce and

Labor, a force adequate to the performance of all work required for the proper investigation, inspection, and regulation of the Alaskan fisheries and hatcheries, and he shall annually submit to Congress estimates to cover the cost of the establishment and maintenance of fish hatcheries in Alaska, the salaries and actual traveling expenses of such officials, and for such other expenditures as may be necessary to carry out the provisions of this Act.

Sec. 13. That any person, company, corporation or association violating any provision of this Act or any regulation established in pursuance thereof shall, upon conviction thereof, be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for a term of not more than ninety days, or by both such fine and imprisonment, at the discretion of the court; and in case of the violation of any of the provisions of section four of this Act and conviction thereof a further fine of not more than two hundred and fifty dollars per diem may, at the discretion of the court, be imposed for each day such obstruction is maintained. And every vessel or other apparatus or equipment used or employed in violation of any provision of this Act, or of any regulation made thereunder, may be seized by order of the Secretary of Commerce and Labor, and shall be held subject to the payment of such fine or fines as may be imposed.

Sec. 14. That the violation of any provision of this Act may be prosecuted in any district court of Alaska or any district [37] court of the United States in the States of California, Oregon, or Washington,

And it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act and the rules and regulations made thereunder. And it shall be the duty of the district attorney to whom any violation is reported by any agent or representative of the Department of Commerce and Labor to institute proceedings necessary to carry out the provisions of this Act.

Sec. 15. That all Acts or parts of Acts inconsistent with the provisions of this Act are, so far as inconsistent, hereby repealed.

Sec. 16. That this Act shall take effect and be in force from and after its passage."

VII.

That the provisions of the Act of Congress of March 3, 1899, as the same was amended on June 6, 1900, entitled, "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for the District," referred to in paragraph one of the said Act of June 26, 1906, are as follows, to wit:

"That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a district court or a subdivision thereof in said District, and pay for said license for the respective lines of business and trade as follows, to wit:

'Abstract offices, fifty dollars per annum.

'Banks, two hundred and fifty dollars per annum.

'Boarding houses having accommodations for ten

or more guests, fifteen dollars per annum.

'Brokers (money, bill, note and stock), one hundred dollars per annum.

'Billiard rooms, fifteen dollars per table per annum.

'Bowling alleys, fifteen dollars per annum.

'Breweries, five hundred dollars per annum.

'Bottling works, two hundred dollars per annum.

'Cigar manufacturers, twenty-five dollars per annum.

'Cigar stores or stands, fifteen dollars per annum.

'Drug stores, fifty dollars per annum.

'Public docks, wharves, and warehouses, ten cents per ton on freight handled or stored.

'Electric-light plants, furnishing light and power for sale, three hundred dollars per annum.

'Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish-oil works, [38] ten cents per barrel; fertilizer works, twenty cents per ton.

'Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

'Gas plants, for heat or light, for sale, three hundred dollars per annum.

'Hotels, fifty dollars per annum.

'Insurance agents and brokers, twenty-five dollars per annum.

'Halls, public, ten dollars per annum.

'Jewelers, twenty-five dollars per annum.

'Mines: Quartz mills, three dollars per stamp per year.

'Mercantile establishments: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum.

'Meat markets, fifteen dollars per annum.

'Manufactories not enumerated herein, same classification and license charges as mercantile establishments.

'Physicians, itinerant, fifty dollars per annum.

'Plaining mills, fifty dollars per annum when not part of a sawmill.

'Pawnbrokers, three hundred dollars per annum.

'Peddlers, twenty-five dollars per annum.

'Patent-medicine venders (not regular druggists), fifty dollars per annum.

'Railroads, one hundred dollars per mile per annum on each mile operated.

'Restaurants, fifteen dollars per annum.

'Real estate dealers and brokers, fifty dollars per annum.

'Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, registered in Alaska or not paying license or tax elsewhere, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

'Sawmills, ten cents per thousand feet on the lumber sawed.

'Steam ferries, one hundred dollars per year.

'Toll road or trail, two hundred dollars per annum.

'Tobacconists, fifteen dollars per annum.

'Tramways, ten dollars for each mile or fraction thereof per annum.

'Transfer companies, fifty dollars per annum.

'Taxidermists, ten dollars per annum. [39]

'Theaters, one hundred dollars per annum.

'Waterworks, furnishing water for sale, fifty dollars per annum.' ''

VIII.

That the defendant has, ever since the enactment of said act of Congress dated June 26, 1906, anually made application for and been granted licenses to operate a salmon cannery as therein stated, and has paid the license taxes on its said business and output as therein provided; that it has complied with all the provisions of chapter 3 of title 7 of the Compiled Laws of Alaska, relating to fish and fisheries, and that the license fees and taxes so paid by defendant have been accepted by the United States under the provisions of said act.

IX.

That the defendant has declined to apply for or

obtain a license from the Territory of Alaska, or to pay for said license for its said business of conducting a salmon cannery in accordance with the provisions of said House Bill No. 109, and that by reason of such refusal the Territory of Alaska has deemed the defendant guilty of a misdemeanor. That a controversy has therefore arisen between the parties hereto as to the validity of the provisions of the said House Bill No. 109, so far as the same requires this defendant to apply for and obtain licenses to operate its said salmon cannery and gill-nets and to pay license fees thereon, the defendant contending that it is not required by law to apply for said licenses, or any of them, or to pay the said license charges, or any of them, so as aforesaid provided by House Bill No. 109, and the Chief Counsel representing the Territory of Alaska contending that the defendant **[40]** is required by law to so apply for said licenses, and to pay said charges and all of them.

X.

It is stipulated and agreed by the parties hereto, that in the event that the Court shall determine that the said license fees and charges provided by said House Bill 109 be valid, then that a judgment may be entered against the defendant in the following amounts, to wit:

For salmon packed in the year 1915, $1,158.28; for gill-nets used in the year 1915, $131.75, together with interest thereon at the rate of 8% per annum from January 15, 1916.

And for a further, separate and distinct statement of facts, hereby submitted, it is agreed:

I.

That by an act approved May 1, 1913, the legislature of the Territory of Alaska enacted a law designated as House Bill No. 96, which is as follows, to wit:

"AN ACT to establish a system of taxation, Create Revenue, and Provide for Collection Thereof for the Territory of Alaska, and for other Purposes.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to wit:

Fisheries: Salmon canneries, seven cents per case on sock eye and king salmon; one-half cent a case on hump-back, cohoe, or chum salmon.

Cold Storage Fish Plants: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per [41] annum, three hundred and seventy-five dollars per annum; doing a business of fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten

thousand dollars per annum twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The annual business of this section shall be considered the amount paid per annum for the product.

Laundries doing a business of more than five thousand dollars per annum, twenty-five dollars.

Meat Markets: Doing a business of more than five thousand dollars per annum and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of more than ten thousand dollars per annum, fifty dollars per annum; doing a business of more than fifty thousand dollars per annum, seventy-five dollars per annum; doing a business of more than seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of more than one hundred thousand dollars per annum, five hundred dollars per annum.

Furs: One-half of one per cent of the gross value of any furs, the product of Alaska, exported from the Territory and it shall be unlawful and punishable under this act for any person to ship from the Territory of Alaska any furs without having first paid for and obtained a license permit as herein provided; and no custom officer shall issue a manifest for nor postmaster receipt for mailing any furs unless the shipper thereof shall present a certificate for this license fee signed by the clerk of the district court of the division in which the furs were shipped.

Telephone Companies: Doing a business of more than twenty-four hundred dollars per annum, one-

half of one per cent of the gross volume of business per annum over and above the sum of twenty-four hundred dollars.

Transient and Itinerant Merchants, two hundred dollars per annum.

Mining: One-half of one per cent on net income over and above five thousand dollars per annum.

Insurance Companies: A tax shall be imposed on all premiums payable on risks in the Territory of Alaska of one per cent of the amount of such premiums.

1. In the case of such insurance premiums being paid to companies not licensed to do business in the Territory of Alaska, mutual's or Lloyd's, such tax shall be payable by the insured;

2. In case of premiums paid to companies licensed and doing business in the Territory of Alaska; such tax shall be payable by the company receiving the same.

Express Companies: Express Companies to pay one per cent of the business done by said express companies in the Territory of Alaska per annum.

Lighterage Companies: Ten cents per ton on freight handled or lightered.

Public Messengers, twenty-five dollars per annum.

Public Scavenger, fifty dollars per annum.

Lodging Houses, ten dollars per annum.

Reindeer owned by white men, twenty-five cents per head per annum. **[42]**

Fishing Vessels: Fishing vessels propelled by mechanical power of over thirty tons net and plying or fishing in the waters of Alaska, one dollar per ton

per annum on net tonnage, custom-house measurement, of each vessel.

Transportation: On every ton of freight shipped into or from the Territory of Alaska by any transportation company or steamship line, per annum, payable through the custom house at time of entry to be paid into the Territorial Treasury, ten cents per ton, except return shipments of casks, tanks, kegs, carboys or other receptacles used in the shipment of liquids.

Sec. 2. That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon: Provided, That the clerk of said court in each division thereof shall give bond or bonds in such amount as the Treasurer of the Territory may require and in such form as the governor may approve, the premium on said bond to be paid from any funds in the Treasury of the Territory of Alaska not otherwise appropriated, and all moneys received for licenses by any clerk of a district court in this Territory under this act, except the moneys derived from fisheries, (one-half of which amount shall be paid by the clerk into the Territorial Treasury to be made available for the propagation and preservation of salmon and other fish in the Territory of Alaska and to be expended under the direction of the United

States Bureau of Fisheries) shall, except as otherwise provided by law, be covered into the Treasury of the Territory of Alaska, under such rules and regulations as the Territorial Treasurer may prescribe.

Sec. 3. That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction theref shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, That each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided further, That in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay

said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person or corporation and process shall be [43] issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings.

Sec. 4. All United States marshals and their deputies as ex-officio constables, United States fish commissioners and their deputies, in the Territory of Alaska are hereby made license inspectors under this act and shall have power and authority to go upon premises and examine the books, papers, bills of lading, and all other documents bearing upon any matters provided for in this act, of any person, firm, or corporation whom they have reasonable grounds to believe is evading this act; and if any United States marshal, or his deputy, United States fish commissioner or his deputy, as ex-officio constables shall find any person, firm, or corporation violating this act, or any provision thereof, it shall be the duty of said deputy marshal to go before a United States commissioner, file a complaint in writing charging the person, firm or corporation so violating this act with a misdemeanor, as provided herein, and upon obtaining a warrant upon said complaint to arrest the said person, firm, or corporation and take him or them before the United States commissioner issuing the warrant for trial."

II.

That defendant, during the year 1913, and subsequent to July 31st of that year, packed at its said cannery in Alaska, the followning cases of salmon, to wit:

Of Sockeye and King Salmon.....29,955 Cases
Of Humpback, Cohoe or Chum Salmon.. 5,267 Cases

That for the year 1914, defendant packed at its said cannery the following cases of salmon, to wit:

Of Sockeye and King Salmon.....35,761 Cases
Of Humpback, Cohoe or Chum Salmon.. 3,430 Cases

III.

That the defendant had, for the years 1913 and 1914, made application for and obtained from the Secretary of Commerce and Labor, licenses to transact its said business, and paid all license fees and charges required by the act of Congress dated June 26th, 1906, hereinbefore set forth, both upon the business of the defendant and its output. That the defendant has declined to apply for the licenses, or any of them, required by the said House Bill No. 96, enacted by the legislature of the Territory of Alaska, and has declined to pay the license fees therein provided, and the same have not been paid in whole or in part. **[44]**

IV.

It is further stipulated that if the Court shall determine that the defendant is legally liable for the license fees and taxes provided by the said House Bill No. 96, that judgment may be entered against the defendant herein for the following sum, to wit: Four Thousand, Six Hundred Forty-three and 60/100 (4,643.60) Dollars in addition to the amounts named on page 22 hereof, as license fees and taxes for the year 1915.

V.

It is further agreed that all of the foregoing acts of Congress and the legislative acts of the legislature of the Territory of Alaska and the decisions of the United States Circuit Court of Appeals, may be considered in connection with the facts set forth in this additional statement of facts, with the same force and effect as if the same were fully set forth at large herein.

VI.

It is further agreed that by the act of Congress dated June 26th, 1906, entitled "An act for the protection and regulation of the fisheries of Alaska," hereinbefore set forth, it is among other things provided that the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries operated in Alaska shall be exempt from all license fees and taxation of every nature, at the rate of ten cases of canned salmon to every one thousand Red or King salmon fry liberated. That certain companies engaged in the business of canning salmon in the Territory of Alaska have for many years last past continuously maintained and operated private salmon hatcheries in Alaska, and that they have made application to the Secretary of Commerce and Labor that such private hatcheries be inspected, and [45] that the Secretary of Commerce and Labor has approved of such hatcheries and has caused notice of such approval to be filed in the office of the clerk of the United States District Court of the Division of the District of Alaska wherein such hatcheries are located, and

that all the steps have been taken and done by the owners of such private hatcheries to enable them to claim the exemption from license fees and taxation provided in section 2 of the said act of June 26th, 1906. That a controversy has arisen between the district of Alaska and the owners of said private salmon hatcheries as to the extent to which the liberation of salmon fry from said hatcheries, and the certificates issued therefor, shall be used for the purpose of discharging all license fees and taxes imposed upon the output of the canneries operated by the owners of said hatcheries, it being contended by the owners of such hatcheries that by the application of a certificate for each one thousand of salmon fry liberated they are released from all further obligation to pay any license fees or taxes imposed either by the Congress of the United States or by the legislature of Alaska upon ten cases of salmon put up by said canner, and it being contended on the other hand, by the chief counsel for the district of Alaska, that the said certificates for salmon fry so liberated do not operate to release the owners of said private salmon hatcheries from any obligation to pay the license fees and taxes so as aforesaid imposed by the acts of 1913 and 1915 of the legislature of Alaska. **[46]**

VII.

It is stipulated by the parties hereto that this statement and any part thereof may be amended from time to time, either at or before the final argument before the Court, so as to set out fully all the facts necessary to enable the Court to determine

the matters in controversy.

VIII.

It is further stipulated that the questions to be decided by the Court, and which are covered by this agreed statement of facts, are as follows, to wit:

1. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the said act of the legislature of Alaska designed as House Bill No. 96, approved May 1, 1913.

2. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska known as House Bill No. 109, approved April 29, 1915.

3. Whether or not the owners of private salmon hatcheries, who are also engaged in the business of canning salmon in Alaska, are, by virtue of certificates issued to them by the Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled, by virtue of such certificates, to have the same applied *pro tanto* in payment of all license fees and charges, not only imposed by the said acts of Congress but also by said acts of the legislature of Alaska.

IX.

It is further stipulated and agreed by the parties hereto **[47]** that this controversy is real, and

that these proceedings are taken in good faith to determine the rights of the respective parties hereto, and that upon a judgment being given herein by the said District Court of Alaska, an appeal or writ of error will lie in behalf of the party against whom said judgment is given with like force and effect as if said judgment had been given in an action pending between said parties.

WHEREFORE, the parties hereto do hereby submit the foregoing to the Court for its decision, without action, in accordance with the provisions of chapter 28 of the Code of Civil Procedure of the District Alaska.

THE TERRITORY OF ALASKA.
By J. H. COBB,
Its Chief Counsel.

ALASKA SALMON COMPANY.
By GEO. H. COLLINS, [Corporate Seal.]
Its President.

Z. R. CHENEY,
BOGLE, GRAVES, MERRITT & BOGLE,
KERR, McCORD,
CHICKERING & GREGORY,
Attorneys for Defendant. [48]

United States of America,
Territory of Alaska,—ss.

[Affidavit of Governor Strong of Alaska.]

J. F. A. STRONG, being first duly sworn on oath deposes and says: I am Governor of the Territory of Alaska. The controversy set forth in the foregoing and hereto attached statement is real, and the said

proceeding is taken in good faith to determine the rights of the parties.

J. F. A. STRONG.

Subscribed and sworn to before me this the 9th day of December, 1915.

[Notarial Seal] E. L. COBB,
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918. **[49]**

[Affidavit of Geo. H. Collins.]

State of California,
City and County of San Francisco,—ss.

GEO~~RGE~~ H. COLLINS,

C. E. N. P. being first duly sworn, deposes and says:

That he is an officer, to wit, the president, of Alaska Salmon Company, the defendant herein, and he makes this verification in behalf of said defendant. That he has read the foregoing agreed statement of facts and stipulation, and that the same is true of his own knowledge; that the controversy set forth in the agreed statement of facts is real, and that this proceeding is taken in good faith to determine the rights of the parties; that he, as president of said Alaska Salmon Company, is by the laws of the State of California authorized as a person upon whom service of summons may be made in any judicial proceeding against said Alaska Salmon Company.

GEO. H. COLLINS.

Subscribed and sworn to beore me this 22d day of November, 1915.

[Notarial Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 7th, 1918. **[50]**

The cause was argued orally by the respective counsel; at the conclusion of the arguments, counsel for the defendant submitted in writing and requested the Court to adopt the following conclusions of law, viz.:

[Conclusions of Law Requested by Defendant.]

Conclusion No. One.

That sections six and nine of the act of April 29, 1915, under which this suit is prosecuted, are void and invalid for the reasons:

(A) That the sections of said act above mentioned alter, modify and repeal the act of June 26, 1906, which said act of June 26, 1906, is set forth in paragraph VI of the agreed statement of facts;

(B) Because under the act of August 24, 1912, which said act is set forth in paragraph IV of the agreed statement of facts, the legislative assembly in the Territory of Alaska is prohibited from passing any laws relating to fish or fisheries in the Territory of Alaska;

(C) Because no assessment whatsoever was made upon the property of defendant, taxed under the act of April 29, 1915, prior to the levying of the tax.

The Court thereupon refused to adopt such conclusion, to which refusal defendant excepted, and exception was allowed.

Conclusion No. Two.

The defendant company is not liable for any license taxes for the years 1913–1914, for the reasons that the act of May 1, 1913, designated as House Bill No. 96, did not provide for any civil liability.

The Court thereupon refused to adopt such conclusion, to which refusal defendant excepted, and exception was allowed. **[51]**

Conclusion No. Three.

That the defendant, Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska, approved May 1, 1913.

The Court thereupon refused to adopt such conclusion, to which refusal defendant excepted, and exception was allowed.

Conclusion No. Four.

That the defendant, Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the act of the Alaska legislature, approved April 29, 1915.

The Court thereupon refused to adopt such conclusion, to which refusal defendant excepted, and exception was allowed.

Conclusion No. Five.

That the owners of private salmon hatcheries in Alaska, who are also engaged in the business of canning salmon in Alaska, are by virtue of certificates

issued to them by the Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled, by virtue of such certificates, to have the same applied *pro tanto,* in payment of all license fees and charges, not only imposed by the said acts of Congress, but also by said acts of the legislature of Alaska.

The Court thereupon refused to adopt such conclusion, to which refusal defendant excepted, and exception was allowed.

Conclusion No. Six.

Upon the agreed statement of facts, the Court doth find that the plaintiff is not entitled to any relief in this action, and that [52] defendant is entitled to its costs and disbursements herein expended.

The Court thereupon refused to adopt such conclusion, to which refusal defendant excepted, and exception was allowed.

[Conclusions of Law.]

The Court thereupon adopted and signed the following conclusions of law, viz.:

Conclusion No. One.

That compliance with all the conditions and the payment of the license fees imposed by the acts of Congress set forth in the agreed statement, does not relieve the defendant from the payment of the license taxes imposed by the act of the Alaska legislature approved May 1st, 1913, but that the defendant was obliged to apply for a license and pay the license fees and taxes so imposed.

To which conclusion defendant excepted, and exception was allowed.

Conclusion No. Two.

That the defendant having complied with all the conditions and paid the license fees imposed by the acts of Congress in said agreed statement set forth, is obliged to apply for a license and pay the license fees and taxes imposed by the act of the legislature of Alaska known as House Bill No. 109 approved April 29th, 1915..

To which conclusion defendant excepted, and exception was allowed.

[Order Settling and Allowing Bill of Exceptions, etc.]

JUDGE'S CERTIFICATE.

And now because the above and foregoing matters do not appear of record herein, I, Robert W. Jennings, Judge of the District Court for Alaska, Division Number One, before whom said cause was tried, [53] do hereby certify that the above and foregoing bill of exceptions contains the agreed statement of facts upon which the cause was tried, the conclusions of law requested by the defendant and refused by the Court, and the conclusions of law adopted by the Court; that the bill is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

Dated this 23d day of December, A. D. 1915, during the term at which the judgment herein was rendered and entered.

ROBERT W. JENNINGS,
Judge.

O.K.—COBB.

Filed in the District Court, District of Alaska, First Division, Dec. 23, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. [54]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant,

Citation on Appeal.

United States of America,—ss.

The President of the United States to the Territory of Alaska, Plaintiff, and to J. H. Cobb, Its Chief Counsel, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal filed and of record in the office of the clerk of the United States District Court in and for the Territory of Alaska, Division Number One, in a cause wherein Alaska Salmon Company is appellant, and the Territory of Alaska is appellee, to show cause, if any there be, why the judgment and decree rendered against the appellant, Alaska Salmon Company, in said cause, should not be corrected and speedy justice should not be done to the

parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 23d day of December, 1915, and of the independence of the United States the one hundred and thirty-ninth.

ROBERT W. JENNINGS,
Judge.

Copy received and service accepted this 23d day of December, 1915.

J. H. COBB,
Chief Counsel for the Territory of Alaska.

Filed in the District Court, District of Alaska, First Division. Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. [55]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA SALMON COMPANY,
Defendant,

Praecipe [for Transcript of Record].

To the Clerk of the above-entitled Court:

You will prepare a transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error heretofore perfected to said Court, and include in said tran-

script the following pleadings, proceedings and papers on file, to wit:

1. Conclusions of Law Requested by Defendant.
2. Conclusions of Law and Judgment.
3. Assignment of Errors.
4. Petition for Appeal.
5. Order Allowing Appeal and Fixing Amount of Bond.
6. Petition for Writ of Error.
7. Order Allowing Writ of Error.
8. Writ of Error.
9. Citation on Writ of Error.
10. Stipulation to File Bond in Appellate Court.
11. Defendant's Bill of Exceptions.
12. Citation on Appeal.
13. Praecipe. [56]

Said transcript to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Z. R. CHENEY,
Attorney for Alaska Salmon Company, Defendant and Appellant.

Filed in the District Court, District of Alaska, First Division. Dec. 23, 1915. J. W. Bell, Clerk. By ————, Deputy. [57]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1407–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA SALMON COMPANY,

Defendant.

United States of America,
Territory of Alaska,—ss.

I, J. W. Bell, Clerk of the District Court for the Territory of Alaska, Division Number One, hereby certify that the foregoing and hereto annexed 57 pages of typewritten matter, numbered from one to 57, inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, as per the praecipe, of the plaintiff in error, on file herein and made a part hereof, in the cause wherein the Alaska Salmon Company is plaintiff in error, and the Territory of Alaska is defendant in error, No. 1407–A, as the same appears of record and on file in my office, and that the said record is, by virtue of the writ of error and citation issued in this cause, and the return thereof, in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to Forty-two and 10/100 Dollars ($42.10), has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 23d day of December, 1915.

[Seal] J. W. BELL,
Clerk of the District Court for the Territory of Alaska.

By ——————————,
Deputy.

[Endorsed]: No. 2720. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Salmon Company, a Corporation, Plaintiff in Error and Appellant, vs. The Territory of Alaska, Defendant in Error and Appellee. Transcript of Record. Upon Writ of Error to and upon Appeal from the United States District Court of the District of Alaska, Division No. 1.

Filed December 29, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2720

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA SALMON COMPANY
(a corporation),
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

WARREN GREGORY,
E. S. McCORD,
W. H. BOGLE,
Attorneys for Plaintiff in Error and Appellant.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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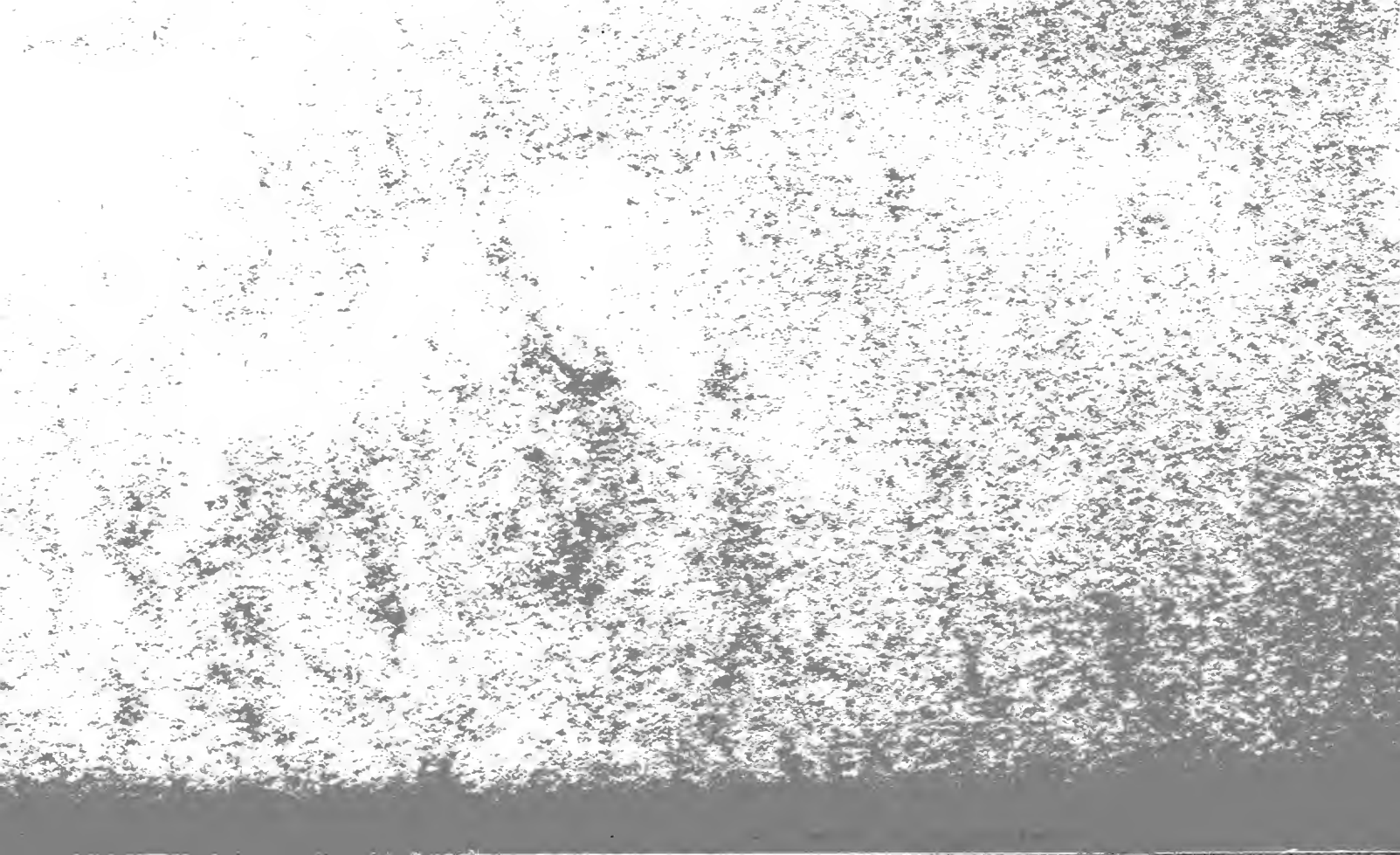

No. 2720

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA SALMON COMPANY
(a corporation),
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

Statement of the Case.

This case involves in its most general aspect consideration of the power of the Legislature of the Territory of Alaska to impose and collect taxes or license charges upon the output and appliances of salmon canneries in the territory.

The solution of the question depends upon the legislative history affecting the subject, and it may be of service to the Court here to state in the briefest possible manner such historical record.

I.

On June 26, 1906, Congress enacted a law entitled: "An Act for the Protection and Regulation of the Fisheries of Alaska". This Act is printed in full in the Transcript (pages 46-54). It is devoted to minute regulations concerning the method of procuring, canning, salting or curing fish, and among other things provides, that every person, company, or corporation carrying on the business of canning fish within the Territory of Alaska shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: "Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton". This law is still in force, unless it has been amended by the Organic Act and the Acts of the Territorial Legislature, hereinafter discussed.

II.

On August 12, 1912, Congress enacted the Organic law of the territory, by which a legislative assembly was created. This Act differs from previous acts passed by Congress for the creation of governmental agencies for the various territories in the country, in that the powers of the proposed Alaskan Assembly are in many respects expressly limited, whereas the usual expression in the Organic Acts of the territories has been that "the

legislative power of a territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States locally applicable". This Organic Act is set out in full in the Transcript, pages 22-36, and Section 3 thereof (Trans. pp. 23-24), is particularly concerned with the presentation of this case.

III.

On May 1, 1913, the newly created legislative assembly of the territory enacted a law designated as "House Bill No. 96" (Trans. pp. 59-64). By this bill any person, corporation or company prosecuting the line of business of conducting fisheries was made liable to pay for a license so to do; seven cents per case on sockeye and king salmon; one-half cent a case on humpback, cohoe, or chum salmon. License charges were also fixed for many other industries within the territory.

In January, 1914, it was held by this Court in the case of

Callahan v. Marshall, 210 Fed. 230,

that that portion of House Bill 96 which purported to impose a poll tax upon the male persons in the territory was invalid on two grounds: First, because the designation of the United States Commissioner as the poll tax collector was invalid, since the United States Commissioner was ineligible to any other office under the government of the territory; and second, because no poll tax could,

under any of the terms of the Act be collected for the year 1913, since there was no territorial treasurer in Alaska until July 3, 1913.

IV.

On August 29, 1914, Congress, obviously to cure the imperfections in the Organic Act noticed by this Court in the aforesaid case, amended the Organic Act so as to provide that nothing should prevent the Territorial Legislature from passing laws imposing additional duties upon the Governor, Commissioner and other United States officials.

V.

Finally, on April 29, 1915, the Territorial Legislature amended House Bill No. 96 by the passage of House Bill No. 109 (Trans. pp. 38-46), by which it was provided that any person, firm or corporation prosecuting or attempting to prosecute certain designated lines of business in the Territory of Alaska should first apply for and obtain a license. For this license there was to be paid, as concerns fisheries: Salmon canneries, four cents per case on kings and reds or sockeye; two cents per case on medium reds; one cent per case on all others. That for salteries there should be paid two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring; and on fish-traps there

should be paid one hundred dollars per annum for fixed or floating traps; for gill-nets one dollar per hundred fathoms or fraction thereof.

The Alaska Salmon Company, plaintiff in error and appellant, has owned and operated a salmon cannery in Alaska since 1901, with the exception of the year 1909, and during all the times covered by the operation of these Acts, with the exception of 1909, was operating its cannery. If it paid the tax required by the Act of 1913, and for the years 1913-14, it would require the sum of $4643.60 (Trans. p. 65) and for the year 1915 it would be obligated to pay for salmon packed $1158.28, and for gill-nets used $131.75, together with interest on these respective sums at the rate of eight per cent per annum from January 15, 1916. (Trans. p. 58.)

The company has up to date and including the years 1913-1915 inclusive, paid all the license fees imposed by the aforesaid Act of Congress of June 26, 1906, and has complied with all the other provisions of said Congressional Act, and the license fees and taxes so paid by plaintiff in error have been accepted by the United States under the provisions of said Act of June 26, 1906. (Trans. p. 57.)

The plaintiff in error, however, has declined to apply for or obtain a license from the Territory of Alaska, as required by House Bills 96 and 109, under claim that it having paid the taxes imposed by the Act of Congress, it was not obligated to again pay the territory upon the same output. By reason of the refusal of the company to so take out

a license for its said business, it has been deemed guilty of a disdemeanor; and thereupon the company and the territory have submitted the controversy at issue upon an agreed statement of facts, under the provisions of Chapter 28 of the Code of Civil Procedure of the District of Alaska. In this statement it is expressly provided that an appeal or writ of error would lie in behalf of the party against whom judgment was given in the trial Court. (Trans. p. 69.) Upon this agreed statement of facts the cause was submitted to the District Court of the Territory of Alaska, Division No. 1, and a judgment given in favor of the territory, from which judgment this writ of error and appeal has been prosecuted.

VI.

SPECIFICATIONS OF ERROR RELIED UPON.

1. The Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said Act of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the Acts of the Legislature of Alaska, approved May 1, 1913, and April 29, 1915.

2. The legislative assembly was prohibited from passing any law relating to fish or fisheries in the Territory of Alaska.

3. The plaintiff in error is not liable for the alleged license charges or taxes because no assess-

ment was made upon the property of plaintiff, as provided in the Organic Act.

4. The owners of private salmon hatcheries who were also engaged in the business of canning salmon in Alaska are by virtue of certificates issued to them by the Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled, by virtue of such certificates to have the same applied pro tanto, in payment of all license fees and charges, not only imposed by the said Acts of Congress, but also by said Acts of the Legislature of Alaska.

Succinctly, the agreed statement of facts states: (Trans. p. 68) that the questions which are now brought to this Court for decision, and which are covered by the agreed statement of facts, are as follows:

> 1. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said Acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the said Act of the Legislature of Alaska designed as House Bill No. 96, approved May 1, 1913.
>
> 2. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said Acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the Act of the Legislature of Alaska known as House Bill No. 109, approved April 29, 1915.
>
> 3. Whether or not the owners of private salmon hatcheries, who are also engaged in the business of canning salmon in Alaska are, by virtue of certificates issued to them by the

Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled by virtue of such certificates, to have the same applied *pro tanto,* in payment of all license fees and charges, not only imposed by the said Acts of Congress, but also by said Acts of the Legislature of Alaska.

Argument.

I.

GENERAL POWERS OF THE TERRITORIAL LEGISLATURE.

There can be little uncertainty concerning the nature of the territorial government since the repeated decisions of the Supreme Court upon that subject. The Territorial Legislature is a creature of Congress subject entirely to its control. That Court has said:

> "that the territory is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to congressional supervision. Its attitude to the general government is no more independent than that of a city to the state in which it is situated and which has given to it its municipal organization."
>
> *Talbott v. Silver Bow County,* 139 U. S. 438, at p. 446.

With these plenary powers of control, it is obvious that Congress may restrict the powers of the Territorial Legislature to such an extent as it sees fit. In other cases Congress has contented itself merely with restricting the legislative power

of the territory to any subject not inconsistent with the Constitution and laws of the United States. It placed no other express limitations of power and such was the character of the Organic Act creating the Territory of Hawaii as construed by this Court in

Peacock Co. v. Pratt, 121 Fed. 772.

The terms of the Alaskan Organic Act make it plain that Congress was unwilling in this instance to confer these broad powers freed from any limitations. Alaska had been governed since 1884 directly by Congress, under the provisions of what was then called the "Organic Act" and the remote position of the territory and the peculiar conditions there prevailing evidently influenced Congress in retaining to a very considerable extent that direct control which it exercised for so many years prior to the creation of the Legislative Assembly. So Congress provided by this Organic Act (Trans. p. 23):

> "That all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature; Provided, that the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal or other general laws of the United States, or to the game, fish, and fur-

> seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes', approved January twenty-seventh nineteen hundred and five, and the several Acts amendatory thereof; Provided further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses. And the Legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction or function exercised by like judges or officers of District Courts of the United States."

Critically analyzing this section, it is seen that Congress has withheld from the Territorial Legislature all power of legislation of any kind concerning the following four general classes of subjects:

1. The customs, internal revenue, postal, or other general laws of the United States.
2. The game, fish and fur-seal laws and laws relating to fur-bearing animals.
3. The laws of the United States providing for taxes on business and trade.
4. The Act of January 27, 1905, providing for the construction and maintenance of roads, etc.

It seems necessary to first more narrowly define these four excepted classes.

The first subdivision concerning the "customs, internal revenue, postal or other general laws of

the United States" requires no further definition as the subjects therein named are clearly marked out in the Revised Statutes.

The second subject, so far as it refers to fish, directly excepts the Act of June 26, 1906, which at the time of the passage of the Organic Act was the only congressional law in force for the protection and regulation of the fisheries of Alaska.

The third subdivision excepting the laws of the United States providing for taxes on business and trade is somewhat ambiguous, since there are many Congressional Acts which provide for occupation taxes. We assume, however, that this third subdivision more particularly refers to an Act as amended June 6, 1900 (31 Stats. at Large, 331) by which any person, corporation or company prosecuting certain lines of business within the District of Alaska was required to apply for and obtain a license so to do. The lines of business therein named number some forty-two and among them is designated fisheries. They were required to pay by this Act:

For salmon canneries ..... 4c per case ;
salmon salteries .....10c per barrel;
fish oil works .....10c per barrel;
fertilizer works .....20c per ton.

We here emphasize that the Act of June 26, 1906, providing for certain license fees and taxes upon the output of fish canneries and regulating the control of the fish industry, was subsequent in point of enactment to this Act providing for a

tax on business and trades; and therefore, at the time of the passage of the Organic Act, the license fees and taxes imposed upon the salmon industry were not those provided by the trade and business Act or any other revenue measure, but by the later Act of June 26, 1906.

The fourth and last excepted legislation is the Act of June 27, 1905 (33 Stats. at Large, 616). This Act provided for a variety of subjects connected with Alaskan affairs, and particularly that all moneys derived from the occupation or trade licenses should be deposited in the Treasury of the United States, to be expended wholly within the District of Alaska for certain purposes therein named. Thus the license fees which the salmon canneries now pay to the Federal Government are devoted wholly to (1) one-fourth for the establishment and maintenance of public schools in Alaska, (2) five per cent to the care and maintenance of insane persons, and (3) the residue to the construction and maintenance of wagon roads, bridges and trails.

II.

THE TERRITORIAL ACTS IN IMPOSING A TAX ON THE SALMON INDUSTRY ARE INVALID BECAUSE PROHIBITED BY THE ORGANIC ACT. THE PROVISO FOR OTHER AND ADDITIONAL TAXES AND LICENSES DOES NOT APPLY TO THE SALMON BUSINESS.

The two Acts of the Territorial Legislature under review undoubtedly "alter, amend, modify and re-

peal'' an Act of Congress then in force in Alaska, viz., the Act of June 26, 1906, because that was an Act ''relating to fish'' which expressly provided that the payment of the license fees thereby imposed ''should be in lieu of all other license fees and taxes therefor and thereon''.

The learned Court below in an instructive opinion, which is printed in full in the Hoonah Packing case (Trans. pp. 6-25), held that the second proviso in Section 3 of the Organic Act, above quoted, by which the Legislature was not prevented from ''imposing other and additional taxes and licenses'', operated as a repeal of that portion of the Act of June 26, 1906, above quoted. It seems obvious that this is the only ground upon which the territory can stand if the judgment below is to be affirmed and it now be held that the Legislature has the power to levy taxes upon the salmon industry in addition to those provided for by the Act of June 26, 1906. It is our contention that this proviso for other and additional taxes and licenses was intended to apply to a classification of subjects other than the fishing industry, because that industry stands by itself.

The foregoing resume of Congressional enactments makes it plain that the fisheries of Alaska were first regarded merely as an industry from which revenue could be obtained, and by the Act of June 6, 1900, they were classed with other industries and occupations named in the trade and business Act. This theory of Congressional control prevailed for some six years; then by the Act of

June 26, 1906, the salmon fisheries and the business of salmon canning were separated from other trades and occupations and placed in a class by themselves, and since the pasage of this Act of 1906, Congress has dealt with the salmon industry as a business separate from other occupations.

When the Organic Act was passed, the only tax on the fishing industry was that provided by the Act of June 26, 1906. As is shown by its title and its subject matter, it is a law which relates only to fish and fish products in Alaska; it contains many minute requirements concerning salmon hatcheries, the erection and maintenance of fish appliances, for closed seasons, for the discretionary powers of the Secretary of Commerce and Labor in closing streams, for labels to be used upon canned salmon, and for the making of detailed annual statements to the Secretary of Commerce and Labor, which statements are used as a basis upon which the license fees to be paid the Federal Government are estimated.

That portion of the Act which provides for license fees and taxes is inseparably connected with these provisions of the Act. Thus, the first statement is that the license taxes therein provided shall be "in lieu of all other license fees and taxes *therefor* and *thereon*". The word "therefor" refers to the right to carry on the business of "canning, curing or preserving fish or manufacturing fish products in the territory known as Alaska"; and the word "thereon" refers to the antecedent word "products", so that it was clearly the intention of

Congress to provide that the taxes thereby levied should be exclusive of the right to further tax either the business or the product of that business. They were thus expressly made in lieu of any occupation tax and also any *ad valorem* tax.

The object and purpose of this Act was the protection, regulation and encouragement of the fisheries. If those engaged in the industry would comply with the drastic regulations of the Act, and thus protect the supply, they were to be absolved from any other taxation. The license imposed, therefore, was not primarily a revenue measure, but a leverage to compel those who fish to foster the industry against exhaustion of supply, by protecting the fish and replenishing the waters.

Informing light upon this intention is shown by the provisions of Section 2, providing for private salmon hatcheries. This section (p. 47) states that the owners of private salmon hatcheries that have been approved by the Secretary of Commerce and Labor

> "shall be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand red or king salmon fry liberated".

The same section later provides (p. 48)

> "that it shall be the duty of all public officials charged with the duty of collecting or receiving such license fees or taxes to accept such certificates in lieu of money in payment of all license fees or taxes upon or against the pack of canned salmon at the ratio of one thousand fry for each ten cases of salmon".

Thus *ex industria* did the Congress signify that one of the main purposes of the Act was to encourage the propagation of fish, and that every one thousand fry liberated should be an equivalent for any license fee or tax that might be levied by any governmental authority upon ten cases of salmon.

When, therefore, the Congress in the Organic Act provided that the Territorial Legislature was not prevented from levying "other and additional taxes and licenses", it is submitted that it could not have intended to repeal this law of June 26, 1906, devoted to the protection and regulation of the fisheries, but, at best, the only purpose of the proviso was to refer to measures for revenue purposes only, and not to an Act such as here under consideration, where the revenue is only an incident to the main purpose of the protection and propagation of fish.

The reason that Congress should thus have differentiated between the other industries which were taxed under the trade and business Act, such as abstract offices, banks, boarding-houses, etc., and the salmon fishing industry, is not far to seek. The salmon is a deep sea fish, whose habitat is the ocean, and its presence in the rivers and streams of Alaska is for spawning purposes only. The salmon is no more to be considered the fish of Alaska than are the fur-seals that formed the subject of the arbitration between Great Britain and the United States to be considered aquatic animals of Alaska. Salmon are part of the food supply of the American people, just as are the cod on the

Great Banks and the blue fish of the North Atlantic. The use of the Alaskan shores and rivers is but an incident of the fishery; the object of the industry, the supply, comes from waters in no sense Alaskan. Congress, by this Act, announced its policy of endeavoring to protect this great food supply and of retaining that control with Congress. It emphatically stated that it did not desire the territory to interfere with this control. The taxation upon the industry is inseparably connected with the other provisions concerning the protection and propagation of the fish.

Aside from the point that the salmon is a deep sea fish, which is not an Alaskan product, it may be well to notice in passing that *canned* salmon, which is the output of the salmon canneries, is by no means the sole product of Alaska. The only element of its value which is derived from Alaskan waters even, is the raw product; the tin plate and solder that go to make up the cans, the labor, the fishing appliances, all are taken into Alaska from other places, so that the proportionate value which the raw fish have to the value of the canned product is infinitesimal.

If the territory can now levy a tax of four cents a case on canned salmon, in addition to a like heavy tax already imposed by Congress, then it can increase this taxation from year to year. Indeed, the Act of 1913 did provide for a tax of seven cents a case upon red salmon, which in addition to the tax of four cents imposed by Congress *would have resulted in a tax of eleven cents per case upon*

the product. Such taxation has the direct effect, of course, of raising the price of the food product to the public, for the canning industry is not established, nor does it exist, to supply the local wants of Alaska, but to preserve this important article of food for transportation throughout the world.

It follows that the Federal license tax on the salmon canning industry is properly not found in a revenue law but in a fish law, entitled "An Act for the protection and regulation of the fisheries of Alaska"; that it is not inserted in this law merely as a revenue measure, but that it is an integral part of the entire scheme of the Act, the purpose of which is to compel the protection of the fisheries. Congress has said by this Act, to every person or company intending to engage in the salmon business in Alaska: "There are many minute regulations which you will be compelled to obey, but if you will so comply, we say to you that upon the payment of four cents per case, you shall be relieved from all other taxation upon your business and your manufactured product". Thus, this Federal license tax must be considered in conjunction with the entire Act, and that Act and every part thereof must be deemed a "fish law" which the Territorial Legislature has been expressly forbidden to alter, amend or repeal.

If, therefore, this proviso to levy other and additional license fees and taxes has operated as a repeal of that portion of the Act of June 26, 1906, providing for license fees and taxes on canned salmon, then it has also operated as a repeal of the entire Act of June 26, 1906, because these license

fees and taxes when considered in connection with the hatcheries must be taken together.

It is our contention that if it had been the purpose of Congress to repeal that portion of the Act of June 26, 1906, which states that the license fees thereby imposed shall be in lieu of all other taxation, which the Congress undoubtedly has the power to do, then that such statement would have been made *directly* and by an express repeal; it would not have been done by an implied repeal through an incidental proviso. In *Minis v. United States,* 15 Pet. 423, it was said at page 445:

> "* * * The office of a proviso, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

Where a State law provided that the licenses thereby imposed upon insurance companies should be in lieu of all town and municipal license charges, but contained a proviso that the section should not be construed to prohibit cities having an organized fire department from levying a tax or license fee not exceeding two per cent on the gross receipts of such insurance agency, it was held that the proviso did not confer any power on a city or incorporated town, and *that it was not a grant of power.*

> *City of Chicago v. Phoenix Insurance Company,* 18 N. E. 668.

Said Mr. Justice Story in *United States v. Dickson,* 15 Pet. 141, at page 165:

> "* * * We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof."

Appeal of Clark, 20 Atl. R. 456.

In *Baggaley v. Pittsburg etc. Iron Co.,* 90 Fed. 636, it is said:

> "We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act."

And in *State v. Weller,* 85 N. E. 761:

> "* * * The cardinal rule in the interpretation of statutes is to ascertain and give effect to the general intent of the act, if that can be discovered. Effect should be given to

every word and clause, and such a construction as will make a proviso plainly repugnant to the body of the act avoided, if possible."

The amount of the license taxes to be paid by the fisheries under the Act of 1900 (the trade and business Act) and the Act of 1906 (the fish Act) is practically identical:

Act of June 6, 1900.	*Act of June 26, 1906.*
Salmon canneries, four cents per case.	Canned salmon, four cents per case.
Salmon salteries, ten cents per barrel.	Pickled salmon, ten cents per barrel.
Fish-oil works, ten cents per barrel.	Salt salmon in bulk, five cents per 100 pounds.
Fertilizer works, twenty cents per ton.	Fish oil, ten cents per barrel.
	Fertilizer, twenty cents per ton.

The Act of 1906, Section 15 (p. 54), stated "that all Acts or parts of Acts inconsistent with the provisions of this Act are, so far as inconsistent, hereby repealed". Thus, by the Act of 1906, all provisions of the trade and business Act providing for taxes on the fishing industry were expressly repealed.

When we find these license tax provisions lifted bodily out of a general revenue Act and incorporated in substantial identity into an Act for the protection of the fisheries, we must presume that there is some reason for such action; that Congress no longer deemed it proper that this tax should be incorporated in the general revenue measure.

It now is disposed to treat the license tax more in the nature of a penalty than for revenue. Its effect is not other than if it provided that all persons engaged in salmon canning who shall propagate and liberate one thousand salmon fry, for every ten cases of salmon canned shall be *pro tanto* released from all taxation. The tax, therefore, was a conditional one inseparably connected with other provisions by which Congress sought to encourage the establishment of hatcheries and the propagation of fish. If all these provisions have been repealed by the simple proviso that the Territorial Legislature may levy other and additional taxes and licenses, then the whole purpose of the Act has been taken away, and Congress has said to the Legislature, "You may not change the fish laws of Alaska directly, but you may by increasing the taxation on the salmon industry indirectly accomplish this same result. We have said to the owner of every salmon hatchery, in order to further the propagation of fish, that we will release him from the payment of taxes by accepting, in lieu of money, certificates for his fry liberated; but we now permit you to abrogate this law by imposing taxes which cannot be paid by such certificates.

The learned trial Judge in his opinion said:

> "As the Organic Act (the Act of 1912) is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former Act which is in conflict therewith, to wit: 'shall, in lieu of all other license fees and taxes'."

With all due respect, it is submitted that the learned Judge has not established his premises. He

has assumed a necessary conflict in order to find an implied repeal; he makes no effort to ascertain if the conflict does exist and if the two Acts can be construed in harmony. Such harmony can be found by assuming that the additional license fees and taxes permitted referred to the only Act which was concerned with that subject, viz., the trade and business Act. We have already shown that the salmon industry is not taxed by Congress under this Act or, possibly, more legitimately may we claim that this right to levy other and additional taxes must refer to other occupations than those named in the trade and business Act.

It would be extraordinary if Congress in the Organic Act has said to the embryonic Legislature, "You may not alter, amend or repeal the trade and business Act, but this must not be construed as preventing you from levying other and additional taxes". This is the same thing as saying, "You may not change the trade and business Act, but you can change it by increasing the taxes".

What, then, did the Congress mean when it said that the Territorial Legislature could not change any one of the four designated classes of laws, but that this provision should not operate to prevent the Legislature from imposing other and additional taxes and licenses? *Surely it did not mean that the Territorial Legislature could impose other and additional customs, internal revenue and postal taxes and licenses.* Yet if the contention of the territory here made is to be sustained, it must

be held that this permission authorized the Territorial Legislature to increase the charges for all or any of the four excepted classes, and the customs, internal revenue and postal laws stand *in pari materia* with the fish laws.

Nor can it mean that Congress thereby intended to repeal the fish laws of the United States applicable to Alaska, because the first proviso had distinctly stated that the Territorial Legislature had no such power. Nor can it mean that the Legislature had power to change the taxes on trade and business, because the first proviso distinctly stated that it had no such power. Reading the legislative intent, as far as we may, from the Acts themselves, it would seem as if the point had been made that the four exceptions named *might* prevent the Territorial Legislature from levying any taxes or imposing any license charges upon a business that had not been previously taxed by Congress; that in order to prevent this the Legislature was by this second proviso not prohibited from imposing taxes and license fees upon lines of business or upon property *that were not already taxed by Congress.* It will be noted that the language used is "imposing other and additional". Thus the tax must be both "other" and also "additional". Its evident purpose was to prevent the Territorial Legislature from imposing what is, in fact, double taxation by taxing the industries which had already been taxed by Congress.

This Organic Act did not create a Territorial Government for Alaska; it simply created a Legislature. The other departments and instrumentalities of Government continued as established by prior Acts of Congress. The funds to support these other departments and instrumentalities were appropriated out of the general funds of the United States. The only means which the United States had to raise revenue from Alaska was from "taxes on business and trade".

Binns v. United States, 194 U. S. 486.

The expenses of the Federal Government to maintain those departments and agencies of government directly under its control would continue and probably increase. By this Act it conferred on the Territorial Legislature power to enact property tax laws (Sec. 9) theretofore non-existent in Alaska. Can it be wondered that Congress jealously undertook to preserve to the United States its sole source of revenue and forbade the Legislature to interfere therewith? If the Legislature had power to amend, alter or repeal these license tax laws, it could impair the revenues of the Federal Government derived from Alaska, or could stop them altogether and thus absolve Alaska from contributing anything to the support of these departments of government. Similarly if granted the power of imposing license taxes on lines of business already subject to the Federal license tax, it could tax them out of existence and thus interfere with the Federal revenue. It could also as already

seen, by so doing, increase the cost of food supplies or drive out of business those engaged in the production thereof by excessive taxation.

If the proviso is to be construed as an exception to the first proviso, there can be no question that the Legislature may impose a license tax on business already subject to the Federal tax. But the object sought to be attained in the previous proviso refusing to grant authority to amend, alter or modify these laws, would be so seriously weakened and impaired thereby that it is incredible that such is the intention. The reasonable interpretation would seem to be that the proviso was inserted out of excess of caution so that it could not be contended that the United States reserved to itself the sole power to impose license taxes and that the territory could not impose such taxes on businesses not subject to the Federal tax. A tax on another line of business can be as readily construed to be an "other and additional tax and license" within the meaning of the Act, as a tax superimposed on an existing tax. The Act being open to both constructions, that should obtain which will give full effect to the manifest policy and purpose of the Act. One construction makes the second proviso in part repugnant to the first, the second makes both harmonize.

As said in *Savings Bank v. United States,* 19 Wall. 227, 236:

> "The broad construction of the proviso contended for makes it plainly repugnant to the

> body of the act, and it is, therefore, inadmissible."

And in *Treasurer v. Clark,* 19 Vt. 129, it is said:

> "But we prefer giving this portion of the statute a sensible meaning, if it will fairly bear such a construction. And we think it will. In order to do this, we have only to limit the extent of the signification of the terms used in the proviso by the general scope of the enacting clause."

The construction sought to be given the word "additional" is not strained. The Supreme Court of Oregon has so applied the word, under somewhat analogous circumstances.

The Constitution of Oregon provides that "while an amendment or amendments (to the Constitution) which shall have been agreed upon by one legislative assembly, shall be awaiting the action of a legislative assembly or of the electors, no *additional* amendment shall be proposed".

In *Kadderly v. City of Portland,* 74 Pac. 710, the questions submitted to the Court in interpreting this section were whether it "prohibits the proposing of an amendment to the Constitution while an amendment of other or different portions of that instrument is pending", or whether "the provision quoted is to be considered as applying only to an amendment on the same subject or article as that previously proposed". The decision turned on the construction of the word "additional". The Court said (p. 717):

> "* * * the meaning of the Constitution is that, while an amendment or amendments

> agreed to by one legislative assembly shall be awaiting the action of a legislative assembly or the electors, *no additional amendment or amendments shall be proposed to any part or clause of the Constitution.*"

But even assuming that the Territorial Legislature is empowered to impose additional license taxes on businesses already subject to the Federal tax, it must be admitted that that is the limit and extent of its authority to legislate in respect to otherwise prohibited subjects. It cannot be contended that in order to impose such tax, it can in *other respects modify, alter, amend or repeal one of these laws.*

Yet the Act of June 26, 1906, provides (Sec. 2):

> "that the catch and pack of salmon made * * * by the owners of private salmon hatcheries * * * *shall be exempt from all license fees and taxation of every nature* at the rate of ten cases of canned salmon to every one thousand * * * fry liberated."

As long as this clause stands, every owner of a hatchery who has liberated one thousand fry is entitled to claim exemption on ten cases from all license taxes of every nature. The territorial tax cannot be enforced thereon, unless this Act has been amended, altered or modified by limiting the operation of this clause, and making it applicable not to taxes of every nature, but only Federal taxes.

It has already been shown that the Act of June 26, 1906, is not a revenue law; that the license tax

provided for thereby is not for the purpose of raising revenue but to compel replenishment of the waters and is not included in the clause "laws providing for taxes on business and trades in the Act of August 24, 1900". This clause is the last germane clause in the Act preceding the further proviso. If the proviso relates solely to this clause, and does not relate to the clause, "the game, fish and fur-seal laws" of course the Legislature had no authority by its Act to alter or modify the Act of June 26, 1906.

From the language of the proviso, it is obvious that it was inserted only because of the presence of the clause "or to the laws of the United States providing for taxes on business and trade". That it applies solely thereto appears so obvious from the mere reading, that it seems almost unnecessary to apply a rule of construction to determine the question. But the rule as stated in *Lewis' Suth. Stat. Constr.,* Sec. 352, is that a proviso "should be construed with reference to the immediately preceding parts of the clause to which it is attached".

> "The proviso * * * must be construed with reference to the preceding parts of the clause to which it is appended."
>
> *Ex parte Partington,* 6 Q. B. 649, 653.

> "In the construction of a statute, the question whether a proviso in the whole or in part relates to, and qualifies, restrains, or operates upon the immediately preceding provisions only of the statute, or whether it must be

taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend, I think, upon its words and import."

King v. Newark-upon-Trent, 3 Barn. & Cres. 59, at 71.

"Such a clause is ordinarily to be confined to the last antecedent, unless there is something in the subject matter, which requires a different construction."

Cushing v. Worrick, 9 Gray 382, 385.

See also

Spring v. Collector, 78 Ill. 101;
Lehigh v. Meyer, 102 Pa. St. 479.

However, conceding that the Act of August 24, 1912, conferred generally upon the Legislature the power to impose additional taxes and licenses upon those lines of business already taxed under the provisions of the Act of March 3, 1899, still the scope and extent of this power conferred must be ascertained and determined by a consideration of the Act in its entirety. It must be construed so as to give effect to each and all of its provisions if possible. The true meaning of any clause or provision is that which best accords with the subject and general purpose of the Act in every other part.

The Act withheld from the Legislature the power to alter, amend, modify or repeal the fisheries law. It also provided that this provision "shall not operate to prevent the Legislature from imposing other and additional taxes and licenses". The

prohibition against altering or amending must be construed in connection with the provision allowing the imposition of other and additional taxes and licenses. It was undoubtedly the purpose of Congress to continue in force in their full integrity the laws relating to fisheries and the other subjects above enumerated. The language used to effectuate this purpose was broad and comprehensive; the Legislature was forbidden to do any act that could remotely encroach upon the four forbidden subjects or the Acts of Congress relating thereto. It was commanded to withhold its hands from those subjects. Such being the manifest purpose of the Act, it can hardly be conceded that in the same Act and Section Congress would have used language that would frustrate such purpose; if it had intended to do so, it would have used clear, unmistakable and affirmative words to express that intention. Any construction of the Act which would authorize the Legislature to alter or modify the fisheries law or the other forbidden subjects would seem to frustrate the very purposes of the Act and convict Congress of gross absurdity.

> "The power to alter depends upon the meaning of the word 'alter'. To alter is to make different without destroying identity, to vary without an entire change."
>
> *Barrett River Co. v. Holway*, 59 N. W. 126.

It was, therefore, the intention of Congress that the fisheries law should not be varied or changed, even in any of its details or provisions. One of the provisions of the fisheries law of June 26, 1906,

was that the licenses therein provided for shall be "in lieu of all other license fees and taxes therefor and thereon". The Act of the Legislature involved in this controversy manifestly alters the foregoing provisions; it changes the fisheries law, at least to that extent, which is in conflict with the prohibition against altering, amending or modifying the fisheries law contained in Section 3 of the Act of June 24, 1912. Yet it is a fundamental principle of statutory construction that all of the provisions of an Act must be construed so as to allow all of the provisions to stand if possible, and it would seem that from any point of view the power to impose other and additional taxes and licenses, if given, must be limited to those lines of business contained in the Act of March 3, 1899, exclusive of the provisions therein contained relating to fisheries. The imposition of other and additional licenses upon abstract companies, banks, electric light plants and other lines of business, except the fisheries, mentioned in the Act of March 3, 1899, does not involve any conflict with the prohibition against enactments by the Legislature to alter, modify or amend the provisions of the Act, for the reason that the Act of June 24, 1912, provides expressly that the imposition of other and additional taxes shall not be construed to be an alteration or modification of the Act. The imposition of additional licenses or taxes upon other lines of business except fisheries does not involve a conflict with the provision against alteration or modification of the

fisheries law of June 26, 1906, neither does the imposition of such additional licenses upon such lines of business, exclusive of the fisheries, conflict with the customs, internal revenue, postal, or other general laws of the United States, or the laws relating to game, fish, fur-seals, or to the Act relating to the construction and maintenance of roads. Therefore, it follows that as to all lines of business mentioned in the Act of March 3, 1899, except the fisheries, the Legislature of Alaska has a free hand to impose other and additional licenses or taxes, to any extent that it may see fit. It cannot impose other or additional licenses upon the fisheries, because such attempt directly conflicts with the fisheries law of June 24, 1906. This construction and interpretation of the Act of 1912 preserves the prohibition against the alteration of existing laws, and at the same time renders effective the proviso permitting the imposition of other and additional licenses, except as to the fisheries. In other words, the provision as to the imposition of additional licenses and taxes upon lines of business already taxed by the existing law, can be held to apply to the laws of the United States providing for taxes on business and trade, except as to the fisheries. The Legislature can impose additional taxes upon any lines of business mentioned in that Act, except where such imposition has the effect of altering, modifying or repealing some other law of Congress relating to the four subjects above enumerated. The power of the Legislature to raise money for the support of the government of Alaska is broad and comprehensive.

It embraces all lines of business mentioned in the Act of 1899, except the fisheries. The fisheries Congress reserved under its exclusive jurisdiction. All other lines of business mentioned in said Act were turned over to the Legislature for licensing and taxing without restriction or limitation.

The power to impose other and additional licenses, if limited to the other lines of business contained in the Act of March 3, 1899, exclusive of the fisheries, is in entire harmony with the provision prohibiting the Legislature from altering, amending or modifying the fisheries laws, and in no event, it seems to us, can this power to impose other and additional licenses and taxes be construed to extend to the right to alter or amend the fisheries laws, but it must be limited to those lines of business defined in the Act of 1899, exclusive of the fisheries.

The question here presented to the Court for decision is a narrow one. Outside of the general principles before-mentioned and illustrated by leading cases, little aid can be apparently given to the citation of authority. It is our duty to seek the legislative intent as it appears from these Congressional Acts, however darkly or gropingly such intent may have been expressed. The territory claims that the same product may be taxed twice, once by Congress and secondly by the Territorial Legislature, and this notwithstanding that the money derived from the Federal tax is devoted entirely to the needs of the territory. (Act of January 27, 1905, 33 Stats. at Large, 616.)

Conceding, for the purpose of argument, that Congress had the power to confer upon the Legislature the right to levy additional taxes upon the same lines of business that were already taxed by Congress, nevertheless such power is so unusual and approaches so closely to the abhorrent condition of double taxation, that it should require a specific and affirmative clause to accomplish such result; it cannot follow by implication.

The Act of June 26, 1906, is the only Congressional Act relating to Alaska which states that the license charges thereby imposed shall be in lieu of all other taxes and licenses. It is obvious that this especial clause was inserted for a purpose, which was the fostering of the fish industry. We cannot *assume* that it was the intent of the Congress to encourage the salmon industry by holding out the assurance that the tax levied by Congress should be the only tax levied upon the business, and then in the next breath state that the Territorial Legislature—the creation and subject of Congress—might levy additional taxes thereon.

It is respectfully submitted, that the only effect that can be given under well recognized rules of construction to this proviso, concerning the right to levy other and additional taxes and licenses, is to confine it either to a classification of businesses not theretofore taxed or, at best, to confine it to those lines of business which were taxed under general revenue measures, and not as is the fish industry under a special law.

III.

IF THE PROVISO IN QUESTION REPEALED THE ACT OF JUNE 26, 1906, BY ELIMINATING THE PROVISION THAT THE TAXES THEREBY IMPOSED SHOULD BE IN LIEU OF ALL OTHER TAXES, THEN IT WOULD APPEAR THAT CONGRESS INTENDED TO TAKE AWAY ITS OWN POWER OF TAXATION UPON THE SALMON INDUSTRY.

The validity of the taxes imposed by the Congressional Act is not now before this Court, and this subdivision of the argument is inserted merely for the purpose of directing attention to one phase of the inquiry; this is, that if the taxation features of the fish law have been repealed, so far as holding out the assurance that they are the only taxes, then the clause authorizing the taxes has been repealed. Reading this Act of June 26, 1906, by its four corners, it is made clear that all of the other provisions of the Act, imposing duties and regulations upon those engaged in the salmon industry, are counter-balanced by the statement from the Government that the industry shall not be taxed, excepting as Congress has stated. Many new salmon canning establishments have been started in Alaska during the ten years since the passage of this fish law, and under its assurance. It is reasonable to suppose that if Congress desired to change the amount of taxation, that consideration would also be given to the other features of the fish bill which imposed duties upon the salmon operators. If the Government had intended to with-

draw the assurance which it held out, it may well be supposed that it would relax some of the regulations that it imposed.

The withholding from the Territorial Legislature of any power to in anywise change the laws relating to salmon, makes it clear, of course, that Congress intended to retain the direct and full control and regulative power over that industry. The territory has not attempted to make any regulations concerning the salmon industry or exercise any governmental control over it; this remains with Congress. It therefore will be a singular situation if the territory can now exact payment of heavy taxes from an industry over which it furnishes no protection. The Territory of Alaska is subjected to no expense whatever in connection with the supervision of the salmon industry; all of this expense is borne by Congress through the Bureau of Fisheries. This suggestion we make to show that it could not have been the intention of Congress that it should bear all the expense connected with the governmental control of this great industry and permit the territory to nevertheless exact large governmental charges therefrom. If there had been any thought that the territory might impose taxes upon the industry in addition to those already imposed by Congress, then assuredly there would have been some division of the governmental expense connected with such industry.

IV.

THE LEGISLATIVE ACTS ARE INVALID BECAUSE CONTRARY TO THE FIRST PROVISION OF SECTION 9 OF THE ORGANIC ACT.

This Section 9 (pp. 27-28) begins by stating "The legislative power of the territory shall extend to all rightful subjects of legislation, but not inconsistent with the Constitution and laws of the United States". A tax upon the salmon industry by the Legislature in addition to a similar tax already imposed by Congress is "inconsistent" with a law of the United States, viz., the Act of June 26, 1906. For reasons already stated, these taxes imposed by the Territorial Legislature are inconsistent with the spirit and purpose of the Act of June 26, 1906. It would be an anomalous situation if Congress intended to impose a tax under the Act of June 26, 1906, which states directly that such tax shall be in lieu of all other taxes, pay over the entire proceeds of such tax to the territory and then that a Territorial Act would be "consistent" which proceeded to again tax the same product.

V.

THE ACTS OF THE TERRITORIAL LEGISLATURE IN IMPOSING TAXES ON THE OUTPUT OF SALMON CANNERIES AND THEIR APPLIANCES ARE INVALID BECAUSE IN VIOLATION OF SECTION 9 OF THE ORGANIC ACT.

Section 9 of the Organic Act (pp. 27-28) provides (p. 30):

> " * * * all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year."

The Territorial Act is entitled: "An Act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes" (p. 38); and Section 5 of this Territorial Act provides (pp. 44-45):

> "All taxes levied, laid or provided for in this Act and penalties and interest accrued, are hereby declared to be a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments."

It is manifest that this measure is for revenue purposes and is not levied under the police power. This was directly decided in a case which went to the United States Supreme Court from this Court. *Flanigan v. Sierra County,* 196 U. S. 553. No attempt has been made to base the tax upon the output of salmon canneries or their appliances upon any assessed valuation; nor is there any evidence here that the total tax imposed does not exceed one per cent of the assessed valuation.

The question here presented is of momentous importance, not only to the citizens of Alaska, but also to all the people of this country. This ques-

tion, in brief, is, Can the uniformity clause be set aside in every case by levying a tax under the guise of an occupation or business tax? May the farmer instead of being taxed upon an *ad valorem* basis for his acreage be taxed for carrying on the occupation of a farmer at so much per acre? May the miner be taxed for carrying on the business of mining at so much per ton of output?

It will not be denied that occupation taxes in general are not subject to the uniformity clause. The question here presented goes further; it in practical effect is, May *all* taxes be changed from the form to which we have become accustomed and called occupation taxes?

This ground for claiming that the Territorial Acts are invalid is raised by an assignment of error in this case (p. 7) but it would seem that the argument thereof should more legitimately be made in the other cases now before this Court, wherein taxes are claimed upon a specific species of property, such as traps, gill-nets, etc. We shall therefore not now weary the Court by a repetition of the arguments elsewhere made in this regard by other counsel.

Respectfully submitted,

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NO. 2720.

United States
Circuit Court of Appeals
For the Ninth Circuit

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Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

UPON WRIT OF ERROR TO AND UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

Brief of the Defendant in Error and Appellee

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STATEMENT OF THE CASE.

This is an agreed case under the provisions of Chapter 28 of the Alaska Code of Civil Procedure, providing for the submission of a controversy to the decision of the Court without action.

The facts agreed upon, in brief, show that during the years 1913, 1914 and 1915, the Alaska Salmon Company (hereinafter mentioned as Defendant was engaged in the business of fishing for and canning salmon in the Territory of Alaska; that under the Territorial revenue laws of Alaska of 1913-1915, it was due the Territory of Alaska the sums of money mentioned in the judgment in its favor, unless either the said laws were invalid, or the fishing industry was not subject to taxation by the Territory, Specifically stated, the questions of law submitted to the Court, and which are the only ones before this Court for review, are stated as follows:

1. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the said Act of the Legislature of Alaska, designed (designated) as House Bill No. 109, approved May 1, 1913.

2. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is obliged to apply

for a license and pay the license fees and taxes imposed by the act of the Legislature of Alaska, known as House Bill No. 109, approved April 29, 1915. (Record Page 68).

The acts of Congress referred to are the act of June 26, 1906, which is printed in the Record Pages 46 to 54, and the act of March 3, 1899, printed in the Record Pages 54 to 57. The part of these acts material to the question to be considered, is found in Section 1 of the act of June 26, 1906, (Record Page 46), which provides that every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products, within the Territory of Alaska, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows:—then follows certain specified taxes which are paid to the Federal Government.

By act of Congress of August 24, 1912, Alaska was given a legislature with certain specified powers. This act is printed in the Record Pages 22 to 38, inclusive. In Section 9 of said Act (Record Page 27) the legislative power is defined as follows: "The legislative power of the Territory shall extend to all rightful subjects of legislation but not inconsistent with the Constitution and laws of the United States," etc. Then follows certain limitations which, so far as the question herein involved is concerned, are the following: "All taxes shall be uniform upon the same class of subjects, and shall be levied and

collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one percentum upon the assessed valuation of property therein in any one year."

In Section 3 (Record Page 23) it is provided that the Constitution of the United States and all the laws thereof which are not locally imapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska, shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the Legislature; "Provided, That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend * * * * * * to the game, fish and fur-seal laws, and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade * * * * * *Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses." (Italics ours.)

These are believed to be all the statutory laws

bearing upon the questions here at issue, enacted by Congress.

The first Legislature of Alaska, passed an act approved May 1st, 1913, (which is found in the Record, Pages 59-64) which among other things provide:

"Section 1. That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the District Court, or sub-division thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit: * * *

Fisheries: Salmon canneries, seven cents per case on sock eye and king salmon; one-half cent a case on humpback, cohoe or chum salmon."

The second Legisalture passed an act amendatory of the last Act, approved April 29, 1915, which is found in the Record, Pages 38-46) which, among other things, provide:

"Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license for the respective lines of business, as follows: * * *

"6th. Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents

per case on Medium Reds; one cent per case on all others. * * *

"9th. Gill Nets: One dollar per hundred fathoms or fraction thereof."

Section 3, Page 44 provides, among other things: "It shall be the duty of the Attorney General, or other authorized legal counsel of the Territory, to enforce the provisions of this Act;"

"Section 4: Special remedies provided by this Act, or other Acts of the Legislature, shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be invoked by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions."

In Section 2 it is provided (Record, Page 43) that "all taxes for the current year shall be calculated for the year beginning January 1, and ending December 31st, 1915."

"Sec. 7: The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced."

The above are all the Territorial statutory pro-

visions bearing upon the questions of law herein at issue. The agreed statement shows (Record, Page 58) that if the Act of 1915 is valid, that a judgment for taxes should be entered in favor of the Territory and against the plaintiff for $1158.28, the tax on the canned salmon, and $131.75 for taxes on gill nets. And if the Act of 1913 is held valid, that the Territory was entitled to judgment for taxes due for the years 1913 and 1914 of $4643.60 (Record, Page 65.)

ARGUMENT

The trial court answered the questions submitted to it in the agreed statement, as follows: "That compliance with all the conditions, and the payment of the license fees imposed by the Act of Congress, set forth in the agreed statement, does not relieve the defendant from the payment of the license taxes imposed by the Act of the Alaska Legislature, approved May 1, 1913; but that the defendant was obliged to apply for a license, and pay the license fees and taxes so imposed."

And "that the defendant having complied with all the conditions, and paid the license fees imposed by the Acts of Congress, in said agreed statement set forth, is obliged to apply for a license and pay the license fees and taxes imposed by the Act of the Legislature of Alaska, known as House Bill No. 109, approved April 29, 1915." (Record Pages 73-74), and rendered judgment accordingly.

The defendant contended and requested the court to hold, in substance, as follows:

1. That the Territorial acts, in so far as they imposed a license tax upon fisheries, were within the prohibition contained in Section 3 of the Organic Act against altering, modifying or repealing the fishing laws, or the laws of the United States, providing for taxes on business and trade in Alaska.

2. That said acts of the Territorial Legislature were void, because no assessment whatsoever was made upon the property of the defendant; and,

3. That the Act of May 1, 1913, under which the taxes for 1913 and 1914, were sought to be collected, did not provide for any civil liability. (Record Pages 71-72.) (The court was also asked in the agreed statement, to pass upon the effect, if any, that the release of salmon fry would have as a satisfaction or otherwise of the Territorial tax. But inasmuch as there were no facts whatsoever in the agreed statement pertaining to this matter, the court ignored the request as a mere moot question, and no further attention will be paid to that question in this brief.)

The assignment of errors (Record Pages 6-7) present the questions raised for the consideration of this Court, and while there are nine assignments, they all relate to one or the other points stated.

We believe we can be of more assistance to the Court by presenting our views upon the questions at issue directly, without attempting to follow or

specifically answer the argument of the plaintiff in error and appellant. We wish to say at the outset of the argument, that if, for any reason, whether assigned or not, the Territory of Alaska is without power to tax the fishing industries, or is without power to lay a license tax, the people of Alaska ought to know it, and the Court ought to decide that question. For it is reasonably certain, because of the condition of the Territory, which will hereinafter be adverted to, that the system of taxation adopted by the Legislature in the Acts of 1913 and 1915, herein involved, will be continued unless the Legislature is without the power to collect taxes by means of licenses. And it is reasonably certain that unless the Legislature is without power to tax fishing industries in Alaska, that industry will be made to pay its fair share of the expenses of the Territorial Government. Consequently, the sooner the said questions are finally and authoratively settled, the better it will be for all persons concerned.

Taking up the questions presented in the order above stated, we will deal first with the question:

DOES THE THIRD SECTION OF THE ORGANIC ACT, PROHIBITING THE ALASKA LEGISLATURE FROM REPEALING, AMENDING OR MODIFYING THE FISHING LAWS OF THE UNITED STATES PURTAINING TO ALASKA, AND THE LAWS OF THE UNITED STATES PROVIDING FOR A LICENSE TAX ON BUSINESS, PREVENT THE LEGIS-

LATURE OF ALASKA FROM LEVYING A TERRITORIAL LICENSE TAX ON BUSINESS IN ALASKA FOR TERRITORIAL PURPOSES?

The contention of the defendant is that the proviso contained in Section 3, namely: "Provided, further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses," means merely that the Legislature is not prohibited from imposing other and additional licenses and taxes on other kinds of industry and other kinds of business and trades than the fisheries; that the Act of June 26, 1906, which makes the taxes levied by the Act of Congress upon the fishing industry to be in lieu of all other licenses and taxes whatsoever, is itself a prohibition to the Legislature from laying the license taxes on the fisheries. But the Organic Act is the latest expression of the Legislative, and if there is any conflict between any part of the Act of 1906 and the Organic Act, then the former is to that extent repealed. The proviso contained in Section 3 is clear, unambiguous, and needs no construction. Its meaning is on its face too plain for argument, namely: That in imposing other and additional license or taxes, the Legislature of Alaska was not to be fettered by anything contained in the Act of 1906, or other acts of Congress. And where the language is plain and unambiguous, it would seem that there was no room for construction, and this ought to be decisive of the question.

However, a consideration of the matter in the light of general conditions, and in the light of the debates in Congress at the time the Organic Act was passed, leads to the same conclusion, even if it be conceded that there is any ambiguity in the statutory law itself.

When the first Alaska Legislature met, one of the most serious problems confronting it was the question of revenue. The population of Alaska is almost entirely centered in incorporated towns. More than 90 per cent. of the permanent white inhabitants of the Territory reside in these towns and more than 99 per cent. of the taxable property of the Territory, excluding fishing and mining, is within the incorporated towns. These towns are already burdened with the support of a municipal government. The population is very scattered, in many cases hundreds of miles intervening between one town and another, and it was found that a general property tax would cost at least half of the amount laid to cover the expenses of assessment, equalization and collection, and it was further found that such a tax would bear with a special weight upon the inhabitants of the towns already burdened with the expenses of municipal government. But the people of Alaska were familiar with the system of license taxes imposed by Congress, and in force for some fourteen or fifteen years, and it was found that the expenses of the collection of this tax were comparatively small and that its burden rested upon

those industries best able to bear it. It was further found that if a general property tax was laid upon the property in the Territory, the mining and canning industries, which lie outside of incorporated towns, would pay as much, if not more, taxes, than they would pay under a license system, but the Territory would by no means get the entire benefit of it owing to the enormous cost of collection due to conditions in the Territory.

The salmon cannning industry prior to the year 1915 was the largest single industry in the Territory of Alaska. Its product for the year 1914 was between nineteen and twenty millions. This product consisted of taking and canning the food fish, public property of the Territory, and the tax sought would seem to be only a very small consideration for the privilege of being allowed to take and sell and apply to their own use the proceeds of this public property, or common property, belonging to the people of the Territory. Now, it is obvious that if this industry, the largest in the Territory, cannot be taxed, the necessary revenue for the expenses of the Territorial Government will have to be collected from other people or other kinds of business, and their taxes must necessarily be increased to the precise extent and amount by which the fishing industry is exempted. The law indulges in no presumption in favor of special privileges, or special exemptions. When such privilege or exemption is claimed, the

right to it should be supported by a clear and unambiguous enactment.

The Organic Act of the Territory of Alaska was debated in the lower house of Congress on the 24th day of April, 1912. As the Bill then stood, there was nothing in Section 3 concerning the game or the fish, but the authority granted to the Legislature to alter, amend or repeal laws in force in Alaska was simply not extended to the customs, internal revenue, postal or other general laws of the United States. An amendment was offered by Mr. Willis, as follows: To insert after the word "States"—"or to the game laws of the United States applicable to Alaska." Mr. Mann suggested adding "fish" and the amendment was accepted by Mr. Willis.

In the course of the debate, it seems to have been conceded by the members participating therein, that these words did not deprive the Legislature of the power of passing other laws relating to fisheries not in conflict with the laws passed by Congress, and upon that concession being made, the Delegate from Alaska withdrew his objection to the amendment. (See Vol. 48, Part 6, Page 5288, Congressional Record, 62nd Congress, Second Session). The bill passed the House in this form, and was sent to the Senate. When it reached that body, it was amended by the addition of this provision: "Provided, further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses." When the bill was

sent back to the House, it refused to agree to this and several other amendments, and was sent to conference; and the Committee on Conference in the House recommended that the House recede from its disagreement to this Senate amendment, which was done, and the Senate proviso was added to the bill. (Congressional Record, August 20, 1912.)

It is clear, from the consideration of the above, that there is not on the face of the bill an expression of any such purpose to exempt the fishing industry of the Territory from taxation. And it is further clear that there was not in the minds of the legislators when the bill was passed any such purpose as is contended for by the defendants; but that it was in their minds that the Legislature should have the power to levy taxes and licenses for Territorial purposes in addition to the taxes then being imposed by Congress.

DOES THE FACT THAT NO ASSESSMENT WAS MADE ON THE PROPERTY OF THE DEFENDANTS RENDER THE TAX VOID?

The defendant contends that it does, and seeks to find a justification or support for the contention in the provision in Section 9. But the provision in Section 9 manifestly relates only to the property tax of one per cent., and has no application whatever to license taxes. The exact wording of the provision relied upon is as follows: "All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and the

assessments shall be according to the actual value therof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year."

This sort of requirement applies exclusively to direct property taxes, and does not apply to license taxes.

25 Cyc., 605-6.

And again: "The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the State shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions, a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does

not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement, it is not essential to the validity of taxation that it shall be equal and uniform, and in such case a tax law cannot be declared unconstitutional merely because it operates unequally, injustly or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefitted thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and, further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from

taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent, also, and no further, the principle applies to license fees or taxes imposed under the police power, or for the better regulation of occupation supposed to have an important public aspect."

(37 Cyc. p. 729-33.)

The tax in question levied by the Legislature of Alaska is of the same kind or nature as the tax levied by the Congress of the United States, and which had been in force in Alaska since 1898. The validity of this tax came before the Supreme Court of the United States, in the case of Binne vs. United States (194 U. S. 486) and in the course of the opinion the Court said:

"We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue and that the license fees are excises within the constitutional sense of the term. Nevertheless, we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the

administration of local government in Alaska.

"It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a quasi state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory, or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no

> legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

The license tax levied by Congress was sustained in that case, as not in contravention of that clause of the Constitution of the United States which provides that "all duties, imposts and excises shall be uniform throughout the United States." And the decision was rested mainly upon the ground that Congress, in passing the license tax laws in question, was acting as the Legislature of Alaska, and not in its capacity as the national legislature. Now, if Congress had the power under the Constitution of the United States to lay such a tax, it had the power to delegate it to the Alaska Legislature and it has delegated to the Alaska Legislature power to legislate over "all rightful subjects of legislation" except as in the Organic Act otherwise provided. The Organic Act does contain more restrictions upon the power of the Territorial Legislature than were ever inserted in the Organic Act of any other Territory. But, nevertheless, Congress did give it power to lay license taxes and a property tax not to exceed one per centum of the assessed valuation.

The argument then simply comes down to this: Is the laying of license tax a "rightful subject of

legislation?" That it is, will hardly be disputed.

Does the act laying these license taxes violate any provision of the Constitution of the United States? This is answered in the negative by the Binns case cited above.

Is such legislation forbidden by the Organic Act?

The contention under this head is:

1. That it is forbidden by Section 3 of the Organic Act, which prohibits the Legislature from interferring with the fish and game laws, or the laws providing for a tax on business. But the argument is completely negatived by the further proviso: "That this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses."

2. That such legislation is forbidden in the Ninth Section of the Organic Act, which requires that "all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year." But this provision relates only to property taxes, and has no bearing whatever upon the system of license taxation.

3. It is contended that the acts in question are in contravention of that portion of the Act of Congress of June 26, 1906, providing that the taxes up-

on fishing industry therein laid shall be "in lieu of all other license fees and taxes therefor and thereon." There are two complete answers to this contention. In the first place, when the Act of 1906 was passed, there was no Territorial Legislature for Alaska, and the clause quoted had no application to something then not in existence; and, second, Congress having in 1912 delegated the power to levy other and additional license fees and taxes, that later expression of the legislative will repealed the above clause in the Act of June 26, 1906.

In conclusion, we respectfully submit that the revenue acts passed by the Alaska Legislature in 1913 and 1915, are in all respects valid, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

J. H. COBB,

Chief Counsel of the Territory of Alaska.

No. 2720

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA SALMON COMPANY (a corporation),
Plaintiff in Error and Appellant,
vs.
THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

APPELLANT'S PETITION FOR A REHEARING.

WARREN GREGORY,
E. S. McCORD,
W. H. BOGLE,
Attorneys for Appellant and Petitioner.

Filed this ..... day of October, 1916.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2720

IN THE

United States Circuit Court of Appeals

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ALASKA SALMON COMPANY (a corporation),
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error and appellant respectfully petitions for a rehearing of this cause upon the following grounds:

In argument we urged a point which in our opinion was decisive of the case at bar, yet in its decision the Court has made no reference thereto.

That point is briefly stated as follows:

By the Act of Congress of March 3, 1899 (30 U. S. St. L. 1253) it was provided by section 460

entitled "Tax on business and trades" that any person prosecuting any of several businesses, should first obtain a license so to do, and pay therefor a license tax fixed thereby, and it provided in regard to "Fisheries: Salmon Canneries, four cents per case; salmon salteries, ten cents per barrel; fish oil works, ten cents per barrel; fertilizer works, twenty cents per ton".

This section, amended to increase the tax on certain businesses was incorporated in the Act of June 6, 1900, entitled "An Act making further provision for a civil government for Alaska" etc. (31 U. S. St. L. 321) as section 29 thereof.

The Act of June 26, 1906, entitled "An Act for the protection and regulation of the fisheries of Alaska (34 U. S. St. L. 478) provided:

> "That every person, company or corporation carrying on the business of canning, curing or preserving fish or manufacturing fish products * * * shall, *in lieu of all other license fees and taxes therefor and thereon,* pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton."

The Act of August 24, 1912 (37 U. S. St. L. 512), created a Legislative Assembly in the Territory of Alaska and provided (section 3)

> "that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed

> by Congress, or by the Legislature; provided, that the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska *shall not extend* * * * *to the game, fish and fur seal laws* and laws relating to fur bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade. * * * Provided further, That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses".

The Act of the Territorial Legislature of April 29, 1915 (Session Laws of Alaska, 1915, Chapter 76) provides that any person prosecuting any of several businesses shall first obtain a license and pay therefor a sum fixed by the Act, especially providing as follows in regard to

> "Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents per case on Medium Reds, one cent per case on all others * * * Salteries; two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring"

and also imposing a license tax on fish traps, gill nets and cold storage fish plants.

The Act of June 26, 1906, "for the protection and regulation of the fisheries" is in its entirety a "fish law" within the meaning of the Act of August 24, 1912, creating the legislative assembly. The license tax thereby created, the means therein provided for earning exemption from taxation and the positive guaranty against any additional taxation, are each an essential element in the general scheme of that

Act and each provision, unaltered, unamended and unrepealed is essentially necessary to carry into effect the intent and purpose of that Act as expressed in its title.

That Act has two primary purposes, first, to conserve the salmon as a food supply by regulating the methods and means of taking and preventing wanton destruction and waste, and second, to secure the replenishment of the supply by encouraging artificial propagation.

The first purpose is evidenced by section 3 which forbids the erection of stationary obstructions in narrow streams, for the purpose of capturing salmon or preventing their ascent to spawning grounds; by section 4 which regulates the manner in which nets and traps may be used; by section 5 which specifies times during which salmon may not be taken except by rod, spear or gaff; by section 6 authorizing the Secretary of Commerce to establish spawning grounds, in which fishing shall be prohibited and establish closed seasons in certain streams; by section 8 making wanton waste and destruction unlawful; and by section 11 giving the Secretary of Commerce power to make additional regulations.

The second purpose is evidenced by section 2 which exempts the owners of hatcheries from the license tax on their catch and pack at rate of ten cases for every one thousand fry liberated, provided that such hatcheries pass the inspection of

the Secretary of Commerce and by section 12 providing for the creation of a force to make such inspection.

As to this second purpose the manifest object and intent is that he who takes, but does not replace shall be taxed, but he who takes, and replaces shall be exempt from taxation in proportion to his replacement.

This Act is not therefore primarily a revenue act. The tax thereby imposed is a penalty not a revenue tax. It is imposed as a leverage to induce those whose activities would tend to deplete the supply, to artificially propagate and release fish in order to replenish the supply for the common welfare.

That such was the intent and purpose of Congress is conclusively established by the fact that the license tax on fisheries was lifted bodily from the purely and avowedly revenue provisions of the Acts of March 3, 1899, and June 6, 1900, and incorporated in this Act for the protection and regulation of fisheries. If it were intended only as a revenue measure, there was no reason or object for incorporating it in this Act, and especially so, as the provision was already existent in a general revenue act. Unless it was designed only as a penalty to be imposed on those who would not replenish the streams, there was no object in inserting the express guaranty to those who engage in this business, that this tax, from which exemption might be earned, would be in lieu of all other license fees and taxes.

That this Act in its entirety was a fish law, that every part and portion thereof was intended to coordinate to effect the purpose of the Act, is further evidenced by the fact that the very Act of August 24, 1912, which created the Territorial Legislature also provided for a compilation and codification of all laws applicable to Alaska to be made by the joint committees on territories of the two houses (section 19). These committees of the same Congress which passed the Act did compile the laws which were afterwards published pursuant to a concurrent resolution of the two houses. And this Act *in its entirety* appears in that publication—Compiled Laws of the Territory of Alaska, 1915—as Chapter Three, entitled "Salmon Fisheries" of Title VII, entitled "Fish and Fisheries".

If we are correct in our premise that this is a fish law within the meaning of the Act creating a Territorial Legislature, then under the express provisions of that Act it cannot be repealed, expressly or impliedly, in whole or in part. But the Act to regulate fisheries expressly provides that the tax therein specified shall be "in lieu of all other license fees and taxes", and the Act of the Territorial Legislature does impose another license tax. It is obvious that the latter Act is a repeal of, or an attempt to repeal, the former.

We are aware of the second proviso in the Act creating the Territorial Legislature that "this provision shall not operate to prevent the Legislature from imposing other and additional taxes and

licenses". This however is general language clearly relating to the nearest cognate phrase relating to taxes, viz: "the laws of the United States providing for taxes on business and trade". It is obvious that after this section was originally drafted the clause relating to an act to provide for the construction and maintenance of roads, etc., was inserted, and that originally the second proviso followed immediately after the words "business and trade" for otherwise the words in the second proviso "*this* provision shall not operate" etc., are unnatural. We submit that the correct interpretation of this section is that additional territorial taxes may be imposed on businesses already subject to Federal taxes, unless there is an express prohibition against such taxes in the Act creating the Federal tax, but that additional taxes cannot be imposed, when Congress has guaranteed that there will be no additional tax.

In other words it is inconceivable that when Congress had enacted a law for the protection of fisheries and had worked out a carefully considered and effective scheme for that purpose, when it had expressly forbidden the Territorial Legislature to change or interfere with that scheme, it immediately and in a hidden and ambiguous manner and by adding a further proviso, conferred on the Legislature the power to interfere with that scheme, by repealing an essential and vital feature thereof.

We have already presented in our brief the authorities to support our contention, so will not repeat them here.

In the premises we respectfully submit that we are entitled to have this point considered and decided by this Court, and accordingly petition for a rehearing.

Dated, San Francisco,
October 4, 1916.

WARREN GREGORY,
E. S. MCCORD,
W. H. BOGLE,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

WARREN GREGORY,
Of Counsel for Appellant and Petitioner.

No. 2724

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY J. DAHL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Attorneys for Defendant in Error. [1*]

United States District Court, Western District of Washington, Northern Division.

November Term, 1914.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL and WILLIAM A. McGEE,

Defendants.

Indictment.

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*Page-number appearing at foot of page of original certified Record.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That Harry J. Dahl, *alias* Henry J. Dahl, late of Sumas, Washington, and William A. McGee, late of the county of King in said Washington, heretofore, to wit, on the fifteenth day of January, A. D. one thousand nine hundred and fifteen, at the City of Seattle in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did unlawfully, wilfully, knowingly, feloniously, wickedly and maliciously conspire, combine, confederate and agree together, and together and with divers other persons to the said grand jurors unknown, to commit an offense against the United States, to wit, to violate section [2] eleven of the act of May 6, 1882, as amended and added to by act of July 5, 1884, in this that it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly and unlawfully bring and cause to be brought into the United States and into the Northern Division of the Western District of Washington in said United States from the Province of British Columbia in the Dominion of Canada, by land, certain Chinese alien persons not lawfully entitled to enter

the United States, and not entitled to be or remain in the United States at all, and it was further the object and purpose of the said conspiracy to wilfully and knowingly aid and abet the bringing of said Chinese aliens into the United States by land from the Province of British Columbia aforesaid; they, the said Chinese alien persons, not being lawfully entitled to be or remain in the United States at all; all in violation of the said mentioned Act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Harry J. Dahl, at Seattle in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the eighteenth day of January, A. D. one thousand nine hundred and fifteen, then and there being, did then and there wilfully, knowingly and feloniously give, deliver and pay to the said William A. McGee twenty dollars ($20,00) in lawful money of the United States. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Harry J. Dahl, on the eighteenth day of January, A. D. one thousand nine hundred and fifteen, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, feloniously and corruptly go from

the said city of Seattle, within said District and Division, to the city of Vancouver in the Province of British Columbia in the Dominion of Canada; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Harry J. Dahl, *alias* Henry J. Dahl, late of Sumas, Washington, and William A. McGee, late of the county of King, in said Washington, heretofore, to wit, on the third day of February, A. D. one thousand nine hundred and fifteen, at the city of Seattle in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did unlawfully, wilfully, knowingly, feloniously, wickedly and maliciously conspire, combine, confederate and agree together, and together and with divers other persons to the said grand jurors unknown, to commit an offense against the United States, to wit, to violate section eleven of the act of May 6, 1882, as amended and added to [4] by act of July 5, 1884, in this, that it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly and unlawfully bring and cause to be brought into the United States and into the Northern Division of the Western District of Washington in said United States from the Province of British Columbia in the Dominion of Canada, by land, certain Chinese alien persons not lawfully entitled to enter the United

States, and not entitled to be or remain in the United States at all, and it was further the object and purpose of the said conspiracy to wilfully and knowingly aid and abet the bringing of said Chinese aliens into the United States by land from the Province of British Columbia aforesaid; they, the said Chinese alien persons, not being lawfully entitled to be or remain in the United States at all; all in violation of the said-mentioned act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William A. McGee, on the third day of February, A. D. one thousand nine hundred and fifteen, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, did wilfully, knowingly, feloniously and corruptly conduct, operate and drive an automobile from the city of Seattle to the city of Bellingham, all within the Division and District aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy [5] and in pursuance of and to effect the object of said unlawful conspiracy the said William A. McGee, at Bellingham in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the fifth day of February, A. D. one thoasand nine hundred and fifteen, did wilfully, knowingly, feloniously and

corruptly buy and receive ten gallons of gasoline for use of an automobile, the more particular details of said transaction being to the grand jurors unknown.

And the grand purors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William A. McGee, at Bellingham in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the fifth day of February, A. D. one thousand nine hundred and fifteen, did feloniously and corruptly pay the sum of three dollars ($3.70) and seventy cents in lawful money to the proprietor of a garage or storehouse for automobiles, whose name is to the grand jurors unknown, for storage, repairs and sundry small services in connection with the safekeeping of an automobile, the further particulars of the said safekeeping and storage being to the grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William A. McGee, at Bellingham [6] in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the fourth day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniously and corruptly deliver a letter to the person in charge

of the Owl Drug Store in the city of Bellingham, aforesaid, whose name is to the grand jurors unknown, addressed and directed to him, the said Harry J. Dahl, which said letter then and there contained a statement in writing apprising him, the said Harry J. Dahl, of the arrival of him, the said William A. McGee, in said city of Bellingham, and the place said William A. McGee could thereafter be found in the city of Bellingham; a more particular description of the said letter and a more particular statement of the contents being to the grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Harry J. Dahl, on the third day of February, A. D. one thousand nine hundred and fifteen, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there wilfully, knowingly, feloniously and corruptly go from the said city of Seattle, within said Division and District, to the city of Vancouver in the Province of British Columbia in the Dominion of Canada; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [7]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object

of the said unlawful conspiracy, the said Harry J. Dahl and the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the fifth day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniously and corruptly go and travel from said Bellingham to the city of Sumas, all within said division and district.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the fifth day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, corruptly and feloniously transport and carry the said Harry J. Dahl, and cause him, the said Harry J. Dahl, to be carried and transported from the city of Bellingham to the city of Sumas, in said Division and District, in an automobile; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: [8]

That Harry J. Dahl, *alias* Henry J. Dahl, late of Sumas, Washington, and William A. McGee, late of the county of King in said Washington, heretofore, to wit, on the eighteenth day of February, A. D.

one thousand nine hundred and fifteen, at the city of Seattle in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did unlawfully, wilfully, knowingly, feloniously, wickedly and maliciously conspire, combine, confederate and agree together, and together and with divers other persons to the said grand jurors unknown, to commit an offense against the United States, to wit, to violate section eleven of the act of May 6, 1882, as amended, and added to by act of July 5, 1884, in this, that it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly and unlawfully bring and cause to be brought into the United States and into the Northern Division of the Western District of Washington in said United States from the Province of British Columbia in the Dominion of Canada, by land, certain Chinese alien persons not lawfully entitled to enter the United States, and not entitled to be or remain in the United States at all, and it was further the object and purpose of the said conspiracy to wilfully and knowingly aid and abet the bringing of said Chinese aliens into the United States by land from the Province of British Columbia aforesaid; they, the said Chinese alien persons, not being lawfully entitled to be or remain in the United States at all; all in violation of the said mentioned act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: [9]

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object

of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the eighteenth day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, corruptly and feloniously drive, conduct, operate and cause an automobile to go from said Seattle to the city of Bellingham, all within the district and division aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the eighteenth day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniuosly and corruptly procure lodging, housing and safekeeping in the city of Bellingham, in said division and district, for an automobile.

And the said grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the twenty-third day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly feloniously and corruptly go from [10] the said city of Bellingham, in the di-

vision and district aforesaid, to the city of Vancouver in the Province of British Columbia in the Dominion of Canada, at the instance and request of the said Harry J. Dahl.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said Harry J. Dahl and the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the twenty-third day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniuosly and unlawfully go and travel from the city of Vancouver in the Province of British Columbia, aforesaid, to the city of Bellingham, in the division and district aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the twenty-third day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniously and corruptly procure lodging, housing and safekeeping in the city of Bellingham, in said division and district, for an automobile.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: [11]

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the the twenty-third day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniously and corruptly pay and deliver to the proprietor of the Standard Garage in the said city of Bellingham, whose name is to the grand jurors unknown, the sum of two dollars and twenty cents ($2.20) for storage, care and safekeeping furnished for an automobile.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said Harry J. Dahl and the said William A. McGee, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the twenty-third day of February, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, feloniously and corruptly go and travel from said Bellingham to the city of Sumas, all within said division and district.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of the said unlawful conspiracy, the said William A. McGee, in the Northern Division of the Western

District of Washington, and within the jurisdiction of this court, on the twenty-third [12] day of February, A. D. one thousand nine hundred and fifteen, did wilfully knowingly, corruptly and feloniously transport and carry the said Harry J. Dahl, and cause him, the said Harry J. Dahl, to be carried and transported from the city of Bellingham to the city of Sumas, in said division and district, in an automobile; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

CLAY ALLEN,
United States Attorney.
WINTER S. MARTIN,
Assistant United States Attorney.

[Indorsed]: The United States vs. Harry J. Dahl and William A. McGee. Indictment for Section 37, Penal Code, to violate Sec. 11, Act May 6, 1882. A True Bill. James E. Riley, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury, in Open Court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, March 19, 1915. Frank L. Crosby, Clerk. [13]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 2976.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

H. J. DAHL,
Defendant.

Bond [for Appearance].

KNOW ALL MEN BY THESE PRESENTS: That we, H. J. Dahl, defendant above-named, as principal, and H. Anderson, W. L. Ross and J. E. Belcher, as sureties, are held and firmly bound unto the United States of America and jointly and severally acknowledge ourselves to owe the United States of America the sum of five thousand dollars to be levied on our goods and chattels, land and tenements, if default be made in the condition of this bond for the payment of which sum, well and truly to be made, we do bind ourselves, our heirs, executors, administrators and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 20th day of March, 1915.

The condition of this obligation is such that whereas in the above-entitled court on the 19th day of March, 1915, an indictment was duly presented and returned in court by a grand jury of said court charging the above-named defendant and principal herein, H. J. Dahl, with the crime of bringing and knowingly aiding and abetting in bringing into the United States Chinese persons not lawfully entitled to enter the United States and in violation section 37 of the Penal Code with intent to violate section 11 of the act of May 6, 1882, and the acts of Congress amendatory thereof, which crime is alleged to have been committed on or about the 23d day of [14] February, 1915.

Now, therefore, if the above-bounden, H. J. Dahl, shall well and truly appear and answer said indict-

ment or any other indictments or presentation which may be returned or made against him in said court and thereafter to abide the order of the court and not to depart from the jurisdiction of said court without permission of the judge thereof and to render himself in final judgment and in all things to abide the order of the court in the premises, then this obligation to be void, otherwise to remain in full force and virtue.

H. J. DAHL,
Principal.
H. ANDERSON,
W. L. ROSS,
J. E. BELCHER,
Sureties.

The above bond be and is hereby approved this 20th day of March, 1915.

G. P. FISHBURNE,
Assistant U. S. Attorney.

Approved May 20, 1915.

JEREMIAH NETERER,
Judge.

United States of America,
Western District of Washington,
County of Pierce,—ss.

H. Anderson, a surety on the foregoing bond, being duly sworn, deposes and says: That he resides in the city of Tacoma in the county of Pierce, State of Washington, within the Western District of Washington; that he is a freeholder of the county of Pierce, State of Washington, and is worth the sum of four thousand dollars ($4,000), over and above all

his just debts and liabilities in property subject to execution and sale; that his property consists of real and personal property of value in excess of the sum of four thousand dollars ($4,000).

H. ANDERSON. [15]

Subscribed and sworn to before me this 20th day of March, 1915.

[Seal] M. J. GORDON,
Notary Public, in and for the State of Washington,
Residing at Tacoma.

United States of America,
Western District of Washington,
County of Pierce,—ss.

W. L. Ross and J. E. Belcher, sureties on the foregoing bond, being duly sworn, depose and say and each for himself says: That he resides at the city of Tacoma in the county of Pierce, State of Washington, and within the Western District of Washington; that he is a freeholder of the county of Pierce, State of Washington, and is worth the sum of three thousand dollars ($3,000), over and above all his just debts and liabilities in property subject to execution and sale; that his property consists of real and personal property of value in excess of three thousand dollars ($3,000).

W. L. ROSS,
J. E. BELCHER.

Subscribed and sworn to before me this 20th day of March, 1915.

[Seal] M. J. GORDON,
Notary Public, in and for the State of Washington,
Residing at Tacoma.

[Indorsed]: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Nor. Division. Mar. 20, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [16]

[Minutes of Court, March 22, 1915—Arraignment and Plea.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL et al.,

Defendants.

Now on this day into open court comes the said defendant Harry J. Dahl for arraignment, accompanied by his counsel Messrs. Gordon & McDonald, and being asked if the name by which he is indicted is his true name, replies, "It is." Whereupon, the reading of the indictment is waived and he here and now enters his plea of not guilty to the charge in the indictment herein against him.

Dated March 22, 1915.

Journal 4, page 407. [17]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL et al.,

Defendants.

Demurrer of Dahl to Indictment.

Comes now the defendant Dahl, and demurs to the indictment as a whole, and to each and every count thereof separately, upon the ground that the matters and things alleged therein do not constitute any offense or offenses against the laws or sovereignty of the United States; and that neither said indictment, nor any count thereof, alleges any offense of which this court has jurisdiction; and because said indictment, and each of the counts therein is in other respects informal, insufficient and defective.

GORDON & EASTERDAY,
E. C. MacDONALD,
Attorneys for Deft. Dahl.

[Indorsed]: Demurrer of Defendant Dahl to Indictment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 23, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [18]

[Order Overruling Demurrer.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. J. DAHL et al.,

Defendants.

Now on this day this cause comes on for hearing on demurrer to indictment, the plaintiff represented by Clay Allen and W. S. Martin, and the defendant H. J. Dahl represented by Gordon & Easterday and E. C. Macdonald, and the Court after hearing argument of respective counsel overrules said demurrer.

Dated April 5, 1915.

Journal 4, page 436. [19]

In the District Court of the United States for the Western District of Washington.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find:
Defendant Harry J. Dahl is guilty of Count I.
Defendant Harry J. Dahl is guilty of Count II.
Defendant Harry J. Dahl is guilty of Count III.

A. J. M. HOSOM,
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 4, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

H. J. DAHL et al.,
Defendants.

Order That Present Bond Remain in Force.

Now on this day it is ordered that the present bond remain in force and defendant be released thereunder pending hearing in "Arrest of Judgment."

Dated June 4, 1915.

Journal 4, page 492. [21]

United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA

vs.

HARRY J. DAHL,

Defendant.

Motion for New Trial.

The defendant having heretofore made his motion for judgment *non obstante veredicto,* and motion in arrest of judgment, does now, in the event that said motions are denied and not waiving the same, move the Court for a new trial upon the following grounds:

1st. Errors of law occurring at the trial and excepted to at the time by the defendant.

2d. That the verdict is contrary to the law and the evidence, and is not supported by the evidence.

GORDON & EASTERDAY,
E. C. MacDONALD,
Attorneys for Defendant.

Due service of within motion for new trial admitted June 5, 1915.

ALBERT MOODIE,
Assistant U. S. Attorney.

[Indorsed]: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 5, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [22]

[Minutes of Court, June 26, 1915—Hearing on Motion in Arrest of Judgment and Motion for New Trial.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. J. DAHL,

Defendant.

Now on this day this cause comes on for hearing on motion in arrest of judgment and motion for new trial, the plaintiff being represented by Winter S. Martin, and the defendant present in his own proper person and accompanied by his counsel Gordon & Macdonald, whereupon the arguments are made by respective counsel and the Court takes said matters under advisement.

Dated June 26, 1915.

Journal 5, page 12. **[23]**

[Minutes of Court, July 1, 1915—Order Denying Motions in Arrest of Judgment and Motion for New Trial, etc.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. J. DAHL et al.,

Defendants.

Now on this day defendant H. J. Dahl appears in open court, being represented by his counsel, Messrs. Gordon & Easterday and E. C. Macdonald, whereupon the Court announces his decision, denying motions in arrest of judgment and motion for new trial, and exception is allowed to each defendant. The plaintiff moves for judgment and sentence which is given at this time.

Dated July 1, 1915.

Journal 5, page 19. [24]

[Opinion on Motion in Arrest of Judgment.]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL and WILLIAM A. McGEE,

Defendants.

Filed July 1, 1915.

CLAY ALLEN, United States Attorney, for Government.

WINTER S. MARTIN, Asst. U. S. Attorney, for Government.

E. C. MacDONALD, of Seattle, Washington.

GORDON & EASTERDAY, of Tacoma, Washington.

NETERER, District Judge, for Defendant HARRY J. DAHL.

The indictment in this case charges a conspiracy under section 37 of the Penal Code, for violation of section 11 of the Chinese Exclusion Act of 1882, as amended. After formal parts, count one alleges, "did unlawfully, wilfully, knowingly, feloniously, wickedly and maliciously conspire, combine, confederate and agree together, and together with divers other persons to the grand jurors unknown," and then charges overt acts committed in furtherance of the conspiracy. Each of the counts in the indict-

ment contains similar language, followed by the charge of overt acts. A formal demurrer was tendered by defendant Dahl, but was not argued. The case was tried; the jury returned a verdict of guilty, and a motion in arrest of judgment is made by defendant Dahl. The sufficiency of the indictment is now vigorously attacked, and it is contended that the indictment does not charge a conspiracy to commit an offense against the United States; nor set forth with sufficient particularity the elements of the conspiracy, and that the overt acts set out are not overt acts in furtherance of any conspiracy; that the [25] defendants who are charged with conspiring are not Chinese who are excluded by the act, and that the conspiracy to violate the act could not be entered into unless it included persons who were excluded by the act, as they necessarily must be parties to consummating the unlawful confederation.

I think this part of the objection can be answered by reference to the indictment where it says, "together with divers other persons to the grand jurors unknown." The further objection that the names of the persons who were to be brought into the United States were not given in the indictment, I think is answered by reference to the indictment, where it is alleged, in substance, that the conspiracy was a general conspiracy to bring in Chinese aliens not lawfully entitled to enter the United States. Williamson vs. U. S., 207 U. S. 425–447. An indictment must be free from ambiguity, uncertainty and repugnance, and clearly state every ingredient of

the offense charged. It is not necessary, however, to set out the means by which a conspiracy is to be carried out; nor that they are a part of the agreement or confederation; nor what part each conspirator is to play; nor the character of the acts to be performed to effectuate the purpose. It is the conspiracy to do the unlawful thing that is the gravamen of the offense. The offense charged is not of itself a crime under the Exclusion Act; hence the acts need not be charged with the same particularity. Reason suggests that in a charge of conspiracy to commit a crime, while the particular crime must be alleged, it need not be set out with the same particularity in an indictment as a charge for the crime itself. 5 Ruling Case Law, 1063. This conclusion finds support in the recent decision of the Supreme Court, in which it held that a conspiracy to commit a crime under section 37 of the Criminal Code may be prosecuted even though the time for prosecution of the crime itself has expired, if limitation under the conspiracy section has not elapsed. Justice Pitney, in U. S. vs. **[26]** William Rabinowich, filed June 1, 1915, uses this language:

> "It is apparent from a reading of section 37 Crim. Code (Sec. 5540 Rev. Stat.), and has been repeatedly declared in decisions of this Court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. Callen v. Wilson, 127 U. S. 540, 555; Clune v. United States, 159 U. S. 590, 595; Williamson v. United States, 207 U. S. 425, 447; United States v. Stevenson (No. 2), 215 U. S.

200, 203. And see Burton v. United States, 202 U. S. 344, 377; Morgan v. Devine, No. 685, decided this day. The conspiracy, however, fully formed may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. Williamson v. United States, supra. And it is punishable as conspiracy, though the intended crime be accomplished. Heike v. United States, 227 U. S. 131, 144."

In the same case, the Court says:

"* * * a conspiracy to commit an offense made criminal by the Bankruptcy Act is not of itself an offense 'arising under' that Act within the meaning of section 29d, and hence the prosecution is not limited by that section."

This was a prosecution under a charge of conspiracy to violate Sec. 29d of the Bankruptcy Act in which the indictment must be returned within a year. The indictment was not returned until after the expiration of a year, and the Court concluded that the conspiracy being the gist of the action that the limitation to apply was not under the bankruptcy provision which it was conspired to violate, but the limitation which applied to section 37, supra.

Section 11 of the act of 1882, as amended by the act of 1884, denounces the bringing into the United States of Chinese. Section 13 of the same act excepts from the general provisions, diplomatic and other officers of the Chinese government, with their servants, and other exceptions appear by the act. The act of 1888 designates certain ports for admis-

sion of Chinese, and rule I of the regulation of the department of labor, governing the admission of Chinese, contains a further provision relating to the entry of Chinese into the United States through Canada, requiring an examination at Vancouver [27] for entry at Sumas, the place charged for operation, and other places named. The allegations in the indictment, I think, bring the indictment within the rule of pleading, to fully advise the defendants of every fact which the Government is required to set out. An indictment charging the unlawful bringing into the country of Chinese aliens, manifestly would be insufficient unless it set out the facts with the particularity contended for by the defendant, and such contention is supported uniformly by authority. It is in this respect that the indictment differs from the authorities which have been presented by the defense, and which brings this indictment within the holding of the Court of Appeals of this Circuit, in Wong Din v. U. S., 135 Fed. 702.

The motion is denied.

JEREMIAH NETERER,
Judge.

[Indorsed]: Opinion on Motion in Arrest of Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 1, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [28]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. J. DAHL et al.,

Defendants.

Sentence of H. J. Dahl.

Comes now on this 1st day of July, 1915, the said defendant H. J. Dahl, into open court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence sould not be passed and judgment had against him, he nothing says save as he before hath said.

Wherefore, by reason of the law and the premises, it is considered by the Court that the said defendant H. J. Dahl, be punished by being imprisoned in the United States Penitentiary at McNeil Island, or in such other place as may be hereafter provided for the imprisonment of offenders against the United States, for the term of fifteen months on each count, to run concurrently, at hard labor, from and after this date. And the said Defendant H. J. Dahl, is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Dated July 1, 1915.

[Stipulation Extending Time to Aug. 1, 1915, to Prepare, etc., Proposed Bill of Exceptions.]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA

vs.

HARRY J. DAHL,

Defendant.

It is stipulated that the defendant may have to and including the 1st day of August, 1915, to prepare and serve upon the United States Attorney his proposed bill of exceptions on writ of error herein.

CLAY ALLEN,
United States Attorney.
GORDON & EASTERDAY and
E. C. MacDONALD,
Attorneys for Defendant.

[Indorsed]: Stipulation Extending Time to Serve Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 9, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[30]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Stipulation [for Withdrawal of Government's Exhibits Nos. 3 and 4, etc.].

It is hereby stipulated and agreed by and between the undersigned respective counsel for the plaintiff and defendant above named, that the United States Attorney may withdraw Government's Exhibits Numbers 3 and 4 and substitute therefor copies, certified to by the Acting Commissioner of Immigration at Seattle, Washington, which shall stand and be taken for the originals in all respects.

Dated at Seattle this 28th day of July, 1915.

ALBERT MOODIE,
Attorney for Plaintiff.
GORDON & EASTERDAY,
E. C. MacDONALD,
Attorneys for Defendant.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 28, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[31]**

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Order [Allowing Withdrawal of Plaintiff's Exhibits Nos. 3 and 4, etc.].

Upon the stipulation of counsel for the respective parties above named, this date filed in court;

IT IS HEREBY ORDERED, that the Government may withdraw Plaintiff's Exhibits Numbers 3 and 4, and substitute therefor copies thereof, certified to by the acting commissioner of immigration at Seattle, Washington, which said copies shall stand and be taken for the originals in all respects.

Done in open court this 28th day of July, 1915.

JEREMIAH NETERER,
United States District Judge.

Received the above exhibits this 28th day of July, 1915.

ALBERT MOODIE.

O. K.—E. C. MacDONALD,
Atty. for Deft.

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 28, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [32]

United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA

vs.

HARRY J. DAHL,

Defendant.

Stipulation [and Order Extending Time to August 10, 1915, to Prepare, etc., Proposed Bill of Exceptions].

It is stipulated that the defendant may have to and including the 10th day of August, 1915, to prepare and serve upon the United States attorney his proposed bill of exceptions on writ of error herein.

ALBERT MOODIE,
Asst. U. S. Attorney.
GORDON & EASTERDAY,
E. C. MacDONALD,
Attorneys for Defendant.

On reading and filing the foregoing stipulation, the same is hereby approved.

Done in open court this 30th day of July, 1915.

JEREMIAH NETERER,
Judge.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 30, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[33]**

[Order Extending Time for Filing Amendments to Bill of Exceptions.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL et al.,

Defendants.

For satisfactory reasons appearing to the Court, and upon motion of counsel for the respective parties hereto, the term and time for filing any supplemental amendments to the bill of exceptions herein, and for filing petition for writ of error herein is hereby extended into the November, 1915, term.

Done in open court this 1st day of November, 1915.

JEREMIAH NETERER,
United States District Judge.

[Indorsed]: Order Extending Term. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 1, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[34]**

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That upon the 19th day of March, 1915, an indictment was returned in the above-entitled court charging the defendant Harry J. Dahl and one William A. McGee with having violated section eleven of the act of Congress of May 6, 1882, as amended and added to by the act of July 5, 1884.

That thereafter the defendant Dahl, appearing separately, interposed a demurrer to the said indictment. Thereafter said demurrer was by the Court overruled, to which ruling the defendant excepted and his exception was allowed.

That on the 3d day of June, 1915, this cause came on for trial before the Honorable Jeremiah Neterer, Judge, presiding, and a jury; that the United States moved for and was granted a separate trial as to the defendant Dahl. That upon said trial Messrs. Clay Allen, United States Attorney, and Albert Moodie, Assistant United States Attorney, appeared for the plaintiff, and Messrs. Gordon & Easterday and E. C. MacDonald appeared for the defendant Dahl.

Thereupon the following proceedings occurred. Witnesses on behalf of the United States were produced, sworn and testified as follows:

[Testimony of Fred C. Jenkins, for Plaintiff.]

FRED C. JENKINS.

Mr. GORDON.—I object to the introduction of any evidence in this case upon the ground that the indictment, nor any count thereof, does not state facts sufficient to constitute any offense or crime against the United States.

The COURT.—Objection overruled. Exception allowed.

Mr. JENKINS.—The Chinese that were arrested were given the regular [35] hearing accorded Chinese who are found in the United States without inspection. I did not make the examination; I was present when it was made and made a search of the Chinese when they were caught, and found no certificates on them. We found a few letters on them, addressed to them in Vancouver or other places in British Columbia. We found with one exception their clothes all bore Canadian labels. Chin Pooh had clothes bearing the trade-mark of a Portland, Oregon, firm; his hat, overcoat and all clothes bore the trade-mark of a Portland, Oregon, firm; all the others had Canadian trade-marks on their clothes, and all documents we found in their possession went to show that the Chinese came from Canada; everything they had in their possession came through Canada, except in the case of this one Chinaman. I saw them here yesterday and now recognize them as being the same men arrested in that car that night

(Testimony of Fred C. Jenkins.)

with Dahl and McGee. One was Chin Pooh, Lum Moon and another, Chin Tie; I don't believe I could recall the other fellow's name without referring to the record. A board of inquiry was held on these Chinese. I made a report to my superior officer, and that investigation resulted in the indictment by the Grand Jury. These Chinamen were kept in my immediate custody after the arrest as near as I can remember for probably four or five days, and then they were taken to Seattle.

[Testimony of B. A. Hunter.]

I am an immigration inspector at present in Spokane. I was stationed at Everson, Washington, from about December 30 to the middle of March, 1915. I am not personally acquainted with Dahl or McGee. I have seen them before on the occasion of the arrest of four Chinese in an automobile on a bridge at Everson. I recognize these as the identical Chinese arrested on February 23, 1915, between 9 and 10 P. M. The defendants and Chinese were taken then to Sumas and placed in the Detention Home. [36]

[Testimony of J. L. Zerwig.]

J. L. ZERWIG.

I am inspector in charge of the Vancouver jurisdiction having Chinese matters under my control. I recognize these four Chinese at the railing; saw them at Sumas, Washington, on February 24 or 25, 1915. I had charge of the inspection. The duties are assigned to the subordinate officers; I have supervision of the examination. The records of my office do not

(Testimony of J. L. Zerwig.)

show any application on the part of Chin Kye, Chin Pooh, Wing Hung or Lum Moon, or record of their having offered to apply to my office for an examination required by the Chinese exclusion act of Chinese persons who wish to enter the United States. I was furnished information in regard to these Chinese being arrested and with their names. I will explain that we have what is known as our Chinese Division, which handles Chinese applicants for admission to the United States who arrive from China on trans-Pacific vessels. We also handle applicants from Canada direct, who are residents of Canada, and we have our foreign procedure, and it was under the foreign procedure that these four Chinese were handled. There is no record of their having applied in the regular manner. I am the official custodian of the records, which comprise a transcript of the testimony given in each case of the exempting questions. We have a card index being simply a record of admission into my district from outside points through some port of entry in my district; and in addition to that we have what we call the old records from Richmond, Fremont, Malone and Boston which were transferred. My district and duties embrace the landing of Chinese from oriental ports landing in Canada and seeking to enter the United States from Canada, and those who come by land from any other place to the United States and attempt to enter through my district, which includes Vancouver, Victoria, Blaine and Sumas. No other point has been designated by the Secretary of Labor as a port of

(Testimony of J. L. Zerwig.)

admission for aliens. My [37] office covers the admission of all aliens as well as Chinese. Chinese must pass the immigration test, and must be examined first under the United States immigration law. There is no record showing that these four Chinese ever made application as aliens or Chinese. I received a telephone message to come down and hold a hearing to give these four Chinese an opportunity to establish their right to admission to the United States under the immigration laws.

Q. What did you find in regard to each of these four Chinese?

Mr. GORDON.—Objected to as incompetent, irrelevant, immaterial and not the best evidence. Objection overruled; exception allowed.

A. I found the Chinese had never made application for admission and requested the Secretary of Labor to issue a warrant of arrest.

Q. In regard to this particular hearing, whether that was under the Chinese immigration law as to aliens.

Mr. GORDON.—I object to that as being incompetent, irrelevant and immaterial; objection overruled; exception allowed.

A. Under the immigration law.

Q. Now, this hearing you have just testified to was held under the immigration law prior to the time of the receipt of warrant of arrest?

Mr. GORDON.—I object to that as immaterial and not the best evidence; objection overruled; exception allowed.

(Testimony of J. L. Zerwig.)

A. Yes, sir. The preliminary hearing on which I based my application for warrant of arrest, and which warrant was received in due course of mail.

Q. I show you paper which I will ask be marked Plaintiff's Exhibit 3, and ask you if that is the warrant of arrest you received in this case.

Mr. GORDON.—Same objection. Objection overruled; exception allowed.

A. This is the warrant of arrest I received from the assistant Secretary of Labor. [38]

Q. This warrant of arrest, is this the next step after your report of the hearing is forwarded to Washington? A. It is.

Mr. GORDON.—It may be considered all under the same objection before saved?

The COURT.—Yes.

A. And under that warrant you held another hearing?

A. I held a regular hearing under the warrant of arrest, under the immigration law.

Q. And what was your finding?

Mr. GORDON.—Same objection; same ruling; exception allowed.

A. That they didn't have the right to enter the United States and recommended that a warrant of deportation be issued.

Q. And did you receive a warrant of deportation?

A. I did receive a warrant of deportation through the mail, in the regular channel.

Mr. MOODIE.—Offer that in evidence.

Mr. GORDON.—Objected to as being immaterial.

(Testimony of J. L. Zerwig.)

Q. This warrant of deportation is the next step after the warrant of arrest and hearing?

A. It is.

Mr. MOODIE.—I offer them both in evidence.

Mr. GORDON.—Make the same objection; incompetent and not the best evidence. Objection overruled; exception allowed.

Q. At the time of those hearings did the Chinese present any chopk choes or certificates entitling them to be in the United States? Objected to; objection overruled; exception allowed.

A. They did not. In answer to my question to the four if they had any authority to be in the United States they said they hadn't, each and every one.

Mr. GORDON.—I move to strike the answer. Motion denied; exception allowed.

Q. What is the present status of these Chinese, in regard to what is going to be done?

Mr. GORDON.—Objected to as calling for a conclusion. [39]

The COURT.—Objection overruled. Exception allowed.

A. They are under order of deportation to China.

Cross-examination.

By Mr. GORDON.—Q. These various hearings which you have testified to concerning the right of these Chinamen to be in the United States, or the right to have them deported, were proceedings conducted under your office,—office of Internal Revenue, Department of Labor? A. They were.

Q. Not any part of the judiciary, and neither Dahl nor McGee were parties? A. No.

[Testimony of Moy Don Shing.]

MOY DON SHING.

I am the official Chinese interpreter of the United States at Vancouver, in the immigration office under Mr. Zerwig. I saw the four Chinese in court yesterday. I acted as official interpreter at Vancouver and Sumas for Mr. Zerwig in making the translation of the language to the stenographer; and interpreted fairly and truthfully in translating from Chinese to English for the stenographer at the hearing on February 26, 1913.

Plaintiff rests.

Mr. GORDON.—At this time we ask the Court to withdraw from the consideration of the jury all matters relating to counts one and two of the indictment. I do not think the Government will object to that in view of the opening statement of Mr. Moodie.

The COURT.—Motion denied; exception allowed.

Mr. GORDON.—We move at this time that the Court direct a verdict for the defendant Dahl upon the ground that the indictment is insufficient to charge a crime against the United States and there is no evidence sufficient to go to the jury on the indictment.

The COURT.—Denied. Exception allowed.

Mr. GORDON.—We rest; and now renew our motion for a directed verdict on the grounds stated in the last motion.

The COURT.—Motion denied and exception allowed. [40]

The jury returns its verdict which is read.

(Testimony of Moy Don Shing.)

Mr. MacDONALD.—Before filing the verdict I move for judgment *non obstante veredicto* on the ground that the indictment does not state facts sufficient to constitute a crime on any or either of the counts therein, and that the evidence does not justify the verdict upon any one of the counts.

The COURT.—If the purpose is to prevent the filing of the verdict that will be denied. The verdict will be filed.

Mr. MacDONALD.—I understand that that motion has to be made before the filing of the verdict,—that is the object.

The COURT.—The verdict will be filed.

Mr. MacDONALD.—It is our state practice to require the making of this motion before the filing of the verdict. We also move for an arrest of judgment upon the same grounds.

The COURT.—In view of the statement of counsel, I will take up these motions later. Will you file any other motions?

Mr. MacDONALD.—We will file a motion for a new trial; but we want to make the formal record at this time.

The COURT.—I will take up those motions later.

Thereafter the said motion for judgment *non obstante veredicto* and in arrest of judgment were denied by the Court, and exceptions severally to such decisions were made and allowed.

Thereafter defendant filed and served his motion for new trial, which was denied by the Court; defendant being allowed an exception to such ruling of the Court.

Thereafter the Court proceeded to and did pass sentence upon the said defendant Dahl.

In pursuance of justice and that right may be done the defendant Dahl presents the foregoing as his bill of exceptions and prays that the same may be settled, allowed, signed and certified as provided by law.

GORDON & EASTERDAY,
ERNEST C. MacDONALD,
Attorneys for Defendant Dahl. [41]

It is stipulated that the foregoing bill of exceptions is correct in all respects and as such may be by the Court approved, allowed and settled as the bill of exceptions in said cause, and as such filed in said cause and made a part of the record in said cause. Reserving the right to file a supplemental bill in the event the same may be required.

_____,
Assistant United States Attorney,
GORDON & EASTERDAY,
E. C. MacDONALD,
Attorneys for Defendant Dahl.

The foregoing bill of exceptions is correct, in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

Done in open court this —— day of August, 1915.

_____,
Judge.

[Indorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 6, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [42]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Plaintiff's Amendments to Defendant's Proposed Bill of Exceptions.

Comes now the plaintiff herein, United States of America, and submits the following amendments and additions to defendant's proposed bill of exceptions, praying that same may be made part of said bill as finally settled, allowed, signed and certified.

Page 1, paragraph 1: The indictment charged defendants with violating section 37 of the Penal Code, Conspiracy to violate section 11 of the Chinese Exclusion Act,—a conspiracy to smuggle Chinese aliens into the United States,—and they were not charged with having violated section 11 of said Exclusion Law, which is the consummated offense. Change proposed bill accordingly.

Page 1, next to last line: Insert after "Mr. Jenkins," "Testified that he knew Dahl personally and met him a few times in Sumas prior to the arrest, specifying January 15th in the Mt. Baker Hotel as one occasion.

Page 2: Change period at end of line 4 to semicolon, and add, "nor did I find upon them any evi-

dence whatever of authority for their being in the United States." [43]

Page 3, first line: The name of the witness was Zurbrick. The same error occurs later. The names of the alien Chinese were Chin Poo, Chin Tai, Wong Hong, Lom Moon.

Page 5, line 22: Change to read, "Objection overruled. Plaintiff's exhibits three and four admitted. Exception allowed." [44]

The following additions should be made to the proposed bill of exceptions. (Which fully include all matters appearing after line 16, page 6, of the proposed bill.)

After the testimony of Moy Don Shing, the interpreter, insert:

CHIN POO testified he was born in China, Sun Wooey district, and came to America about ten years ago, landing in Canada at Victoria; had never been in the United States before this one time; lived continuously in Canada since arrival from China; never formally examined nor admitted to the United States.

Q. Have you any certificate of any kind entitling you to enter the United States?

The COURT.—If he was never in the United States and never examined, what is the use of taking time?

I was arrested about February 22, 1915, in the northern part of this State in company with those three boys sitting there at the rail and two white men, all of us being in an automobile. I have known the first boy in [45] Vancouver, B. C., about one

year; the next about four months; and the third for the past few months. I rode the electric car from Vancouver, to Chilliwack and met the three Chinese boys there, then we all walked across the boundary line, and later got into the automobile and rode until we were arrested.

Mr. MOODIE.—You may cross-examine.

Mr. GORDON.—No questions; to save time.

Counsel for plaintiff then called one of the remaining three Chinese to the witness-stand.

The COURT.—Are you going to offer these?

Mr. MOODIE.—Yes. I intend to prove by each of them that he is inadmissible and is present in the United States in violation of law.

The COURT.—There is no occasion for it.

Mr. GORDON.—It is subject to the same objection. We will admit that each of the remaining three witnesses would testify the same as the witness Chin Poo, to save time.

Mr. MOODIE.—Let the record show, Mr. Stenographer, that defendant admits that the witnesses Chin Tai, Lom Moon and Wong Hong would testify to the same effect that Chin Poo has, i. e., that they were born in China; came to America and landed in Canada; that they remained continuously in Canada since arrival from China; that they have never been formally examined or admitted to the United States; and have no certificates of any kind entitling them to be, enter or remain in the United States; that they have never applied for admission, and entered surreptitiously.

Mr. GORDON.—Subject to the objection, with an exception. [46]

The COURT.—Yes.

Counsel for defendant then moved the Court to withdraw from the jury's consideration Counts I and II (overt acts pursuant to conspiracy, charged dates January 15th and February 3d, no arrests made), and argued at length. The motion was denied and exception allowed.

Counsel then moved for a directed verdict for defendant Dahl on the ground of insufficiency of indictment and insufficiency of evidence. Motion denied; exception allowed.

Counsel for defendant then rested his case, waiving the right to introduce any evidence in defense, and renewed his motion for directed verdict on the grounds stated in the last motion. Denied; exception.

Argument to the jury was waived by both sides; the jury was instructed. No exceptions to the charge, save by counsel for defendant who excepted to the Court's failure to direct a verdict.

After the jury had retired counsel for defendant Dahl stated, in the event of an adverse verdict he wished to present a brief argument upon a motion for arrest of judgment; and in the alternative for a new trial. The Court stated that such motion would be heard on a regular motion day.

The jury returned. Counsel for defendant moved for a directed verdict *non. obs, v.,* on the ground of insufficiency of indictment, and insufficiency of evidence. This motion was made before reading of verdict.

The COURT.—If the purpose is to prevent the filing of the verdict that will be denied. The verdict will be [47] filed. The verdict of guilty on all counts was then read and filed.

Mr. McDONALD.—I understand that motion has to be made before the filing of the verdict; that is the only object.

The COURT.—The verdict will be filed.

Mr. McDONALD.—That is our practice in the State courts, that the motion has to be made before reading the verdict. We also move upon the same grounds in arrest of judgment.

The COURT.—In view of counsel's statements I will take up these motions—will you file any other motions?

Mr. McDONALD.—I think we will file a motion for new trial; but we just want to get the formal record at this time.

The COURT.—I will take up the motions later. The defendant will be remanded until it is determined whether the bond is sufficient.

Thereafter the said motions for judgment *non obstante veredicto* and in arrest of judgment and for new trial were denied by the Court, and exceptions severally to such decisions were made and allowed.

Thereafter defendant filed and served his motion for new trial, which was denied by the Court; defendant being allowed an exception to such ruling of the Court.

Thereafter the Court proceeded to and did pass sentence upon the said defendant Dahl.

The various motions for directed verdict on the

ground of insufficiency of evidence to support the verdict requires the bill of exceptions to bring up the total [48] evidence and matters occurring at the trial. Besides the foregoing witnesses there was the following testimony:

FELIX MAINZER, testified that he knew defendant Dahl since 1902, when they worked together. That he runs an automobile for hire and about January 1, 1915, took Dahl from the Palace Hotel, Seattle, to an apartment house on First Avenue, North, and Thomas Street. On the way out Dahl proposed that witness join him in making easy money smuggling Chinese at $175 each. Witness refused point blank, but introduced Dahl to defendant McGee (his driver) the next day and McGee took the proposition up, so advised Mainzer and made a deal for Mainzer's car at $100 a trip, Mainzer to stand running expenses.

About the 15th of January witness drove Dahl out to Columbia City to find McGee and heard them speak of leaving that night. Next saw McGee and the car some five days later, when McGee paid him for use of car, stating that he and Dahl took five Chinese from up country to Tacoma, thence to Portland on train. About three weeks later McGee told witness he was going to make another trip; on returning, said he was with Dahl smuggling Chinese. Had been away some five days; didn't say how many Chinese he took. Settled for use of car and suggested that it be repaired in view of another trip. Told witness how much he made on the trip. After the second trip, some two or three weeks, McGee told

witness he was taking the car for another trip with Dahl. Learned later of the arrest.

McGee told witness Dahl stowed the Chinese in the basement of his house in Tacoma on the second trip. [49]

WILLIAM A. McGEE, corroborated the testimony of Mainzer in regard to meeting Dahl and entering into the conspiracy. First trip: Mainzer brought Dahl to witness at Columbia City and Dahl wanted to leave that night to bring in Chinese. By agreement witness left for Sumas and Dahl for Vancouver, returning to Sumas the next day where he met witness in the Mt. Baker Hotel, in which were stowed away five Chinese. The Chinese were taken out about 6 P. M. and Dahl and McGee drove them in the automobile to Tacoma; thence to Portland by train, where Dahl delivered the Chinese and got paid, saying he got $100 each. Dahl paid witness $303, of which sum witness paid Mainzer on his return $79, having paid out $21 expense on car.

On the second trip, about February 3, 1915, Dahl came to Seattle and looked witness up, and left for Vancouver, instructing witness to meet him in Bellingham with the car; picked Dahl up at Bellingham per agreement and left for Sumas. Dahl left the car a short distance outside Sumas, where McGee picked him up with six Chinese a short while later. The car was then driven to Tacoma; the party then went to Portland by train and Dahl delivered the Chinese, and returned to Tacoma with McGee, paying him $412, and parting with the understanding

that he might look witness up again. McGee settled with Mainzer.

Third trip: On February 18, 1915, Dahl phoned witness from Tacoma to go to Bellingham and wait for him; that Dahl would leave that night for Vancouver. Witness waited four days in Bellingham, then went to Vancouver and found Dahl at the Woods Hotel, and returned with him to Bellingham [50] on train. Both got into auto and went towards Sumas. Dropped Dahl on road outside Sumas and went into Sumas for gas. Returning, found Dahl and four Chinese on the roadside. They got into the car about 8:00 P. M. and the auto was headed for Tacoma. The auto was halted on the road at the Everson bridge and the entire party arrested by United States Immigration men, and taken into Sumas.

"Mainzer's part in the deal consisted simply in suggesting Dahl's proposition to me and in letting me have his car when I wanted it. In each instance he knew I was going out to help Dahl smuggle Chinese. He originally wanted me to split 50–50 but we compromised on $100 per trip, car expenses to be paid by Mainzer. I told him about each trip; he suggested that I look Dahl up and see if we couldn't make some more trips and money."

Mrs. WILLIAM A. McGEE, testified that she was the wife of defendant, William Albert McGee and resided in West Seattle, her husband's father being a guest in her house. That about 8:00 P. M. on or about the 2d of March, 1915, while "Billy" was in jail defendant Dahl came to her house and left a let-

ter with her (admitted as "Plaintiff's Exhibit 1") to be smuggled into jail and given her husband McGee. Dahl instructed her how to place the letter in the back of a photograph holder, or conceal it in her handkerchief, on a visit to the jail. A day of two previous to Dahl's visit she found a card under her door in Dahl's handwriting saying, "Mrs. McGee. Been over a couple of times and you were not at home. I will be here to-morrow evening by eight o'clock. Harry." That she remained home that evening and met Dahl at 8:00 P. M., her [51] father-in-law being present, and saw Dahl, the letter he delivered, and heard the talk. He tried to help his daughter read the letter after Dahl left. Later Dahl returned and called at the house and asked witness if she had given the letter to Billy. She said "No, I destroyed it." Dahl said "Are you sure you did?" "If anyone else got hold of that there would be trouble." Dahl then asked her to meet him down town and she promised to, but didn't keep the date.

Witness identified "Plaintiff's Exhibit 1" as the letter in question.

A. J. McGEE, Sr., testified he was the father of defendant McGee, and then corroborated the evidence of Mrs. William A. McGee next above, adding that Dahl on asking about the delivery of the letter appeared agitated about McGee's welfare.

T. S. SCHLUTER, testified that he found a pocketbook about half a mile west of Sumas on the trial, about 125 yards south of the Canadian boundary after the arrest of the defendants. This pocket-

book and contents was admitted as Plaintiff's Exhibit 7 and 8.

J. A. LOCHBAUM testified he had known Dahl three years; about 5 P. M. the day before Dahl's arrest witness saw him walking north over the trail leading to Schluter's home. Witness was driving his automobile and stopped to ask Dahl to ride with him. Dahl refused, saying he would walk in. On being urged to ride, Dahl simply shook his head and walked off. The meeting place was this side of the line and Dahl was not [52] drunk.

O. G. BURNS, testified that he runs the Mt. Baker Hotel Cafe at Sumas and on January 20th–25th, a white man came in and got six or eight meals to be sent to room 8. Witness delivered the meals, setting the tray on the dresser, no one being in sight in the room.

LLOYD B. BEELER, testified that he runs the Mt. Baker Hotel at Sumas and was tending bar on January 22, 1915, when Dahl came in and registered for room 8 and got key. Dahl only registered for room 8 but Dahl told him the next afternoon "not to bother about making up them rooms." Beeler was trying to get into room 9 at the time when Dahl, who was lying in room 8 got up and spoke to Beeler as he was trying the knob of room 9.

"Plaintiff's Exhibit 6" admitted, being hotel register sheets.

RUSS TYNER, testified he was a liveryman at Sumas and that he had known Dahl three years. About January 15, 1915, Dahl came to rent an auto, stating his wife or child was sick and he wished to

go to Seattle. Tyner said it would cost $100 or $125, but could not get anyone to make the trip on account of the bad roads.

Various witnesses testified to having seen the big red Pierce-Arrow car and its short driver several times at and around Sumas and Bellingham on the dates in question. Among them was C. E. Gilbert, proprietor of the Sumas Garage where the car was stored on each of the three trips. [53]

In pursuance of justice and that right may be done, the United States of America submits the foregoing amendments and additions to defendant's proposed Bill of Exceptions, praying that same may be settled, allowed, signed and certified as provided by law.

CLAY ALLEN,
United States Attorney.
ALBERT MOODIE,
Assistant United States Attorney.

[Endorsed]: Plaintiff's Amendments to Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 6, 1915. Frank L. Crosby, Clerk. By Ed. S. Lakin, Deputy. [54]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Order Settling Bill of Exceptions.

Now, on this 21st day of October, 1915, the above cause came on for hearing on the application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing and it appearing to the Court that defendant's proposed bill of exceptions was duly served within the time provided by law and that the plaintiff's proposed amendments were also served within the time provded by law and the Court having heard counsel and being advised:

Adopts the bill as proposed by the defendant together with the amendments proposed by the plaintiff and it appearing to the Court that said bill of exceptions, as proposed by defendant, taken in connection with the amendments proposed by the plaintiff and hereby adopted contains all of the material facts occurring upon the trial of said cause, together with the exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence which are hereby made a part of said bill of exceptions and the clerk

of this court is hereby ordered and instructed to attach the same hereto.

Ordered that said proposed bill of exceptions, together with said amendments be and the same is hereby settled as a true bill of exceptions in said cause and the same is hereby certified accordingly by the undersigned, Judge of this court who presided [55] at the trial of said cause as a true, full and correct bill of exceptions and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 21, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [56]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY J. DAHL,
Defendant.

Petition for Writ of Error.

To the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington:

Comes now the above-named defendant and respectfully shows: That on the 4th day of May, 1915, a jury duly empanelled in the above-entitled cause found a verdict of guilty against the defendant upon the indictment herein; that thereafter and on the 1st day of July, 1915, final judgment was made and entered herein whereby it was adjudged that the said defendant be imprisoned in the United States penitentiary at McNeill's Island for the period of fifteen months.

That on said judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Your petitioner, said defendant, feeling himself aggrieved by said verdict and judgment entered thereon as aforesaid, herewith petitions this Honorable Court for an order allowing him to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided.

Wherefore your petitioner, said defendant, prays that a writ of error issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit aforesaid, for the correction of errors so complained of, and that a transcript [57] of the rec-

ord, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

GORDON & EASTERDAY,
Attorneys for Defendant Dahl.

Service of the foregoing petition and the receipt of a copy thereof is hereby admitted this 30th day of Nov., 1915.

MOODIE,
Assistant United States Attorney.

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [58]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY J. DAHL,
Defendant.

Order Allowing Writ of Error.

Now on this 30th day of November, 1915, came the defendant and filed herein and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, upon consideration of said petition and being fully advised in the premises, the Court does hereby allow the said writ of error.

And it is hereby ordered that a supersedeas and bail bond having been filed, all proceedings in this cause towards the execution of said judgment are hereby stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

And it is further ordered that the defendant, Harry J. Dahl, shall be released from custody pending the hearing and determination of said writ of error.

JEREMIAH NETERER,
Judge. [59]

Service of the within Order by delivery of a copy to the undersigned is hereby acknowledged this 30th day of Nov., 1915.

A. MOODIE,
Asst. Attorney for U. S.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [60]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA

vs.

HARRY J. DAHL,

Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of errors upon which he will rely upon his prosecution of writ of error herein to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence of the above-entitled court, entered herein on the 1st day of July, 1915.

1st. That the Court erred in overruling the demurrer of the defendant to the indictment, and holding that the same stated facts sufficient to constitute a crime against the United States.

2d. That the Court erred in holding and deciding over the objection of the defendant that the several counts of said indictment stated facts sufficient to constitute a crime against the United States.

3d. That the Court erred in holding and deciding over the objection of the defendant that said indictment was sufficient as a matter of law to permit the introduction of evidence thereunder against the defendant, and permitting over the objection of defendant evidence to be introduced thereunder.

4th. That the Court erred in refusing to with-

draw from the consideration of the jury counts one and two.

5th. That the Court erred in denying defendant's motion for a directed verdict in his favor on each of the counts of said indictment. [61]

5½th. That the Court erred in permitting the introduction of evidence in the following particulars:

Q. What did you find in regard to each of these four Chinese?

Mr. GORDON.—Objected to as incompetent, irrevelant, immaterial and not the best evidence. Objection overruled; exception allowed.

A. I found the Chinese had never made application for admission and requested the Secretary of Labor to issue a warrant of arrest.

Q. In regard to this particular hearing, whether that was under the Chinese immigration law as to aliens?

Mr. GORDON.—I object to that as being incompetent, irrevelant and immaterial; objection overruled; exception allowed.

A. Under the immigration law.

Q. Now, this hearing you have just testified to was held under the immigration law prior to the time of the receipt of warrant of arrest?

Mr. GORDON.—I object to that as immaterial and not the best evidence; objection overruled; exception allowed.

A. Yes, sir. The preliminary hearing on which I based my application for warrant of arrest and which warrant was received in due course of mail.

Q. I show you paper, which I will ask be marked Plaintiff's Exhibit 3, and ask you if that is the warrant of arrest you received in this case.

Mr. GORDON.—Same objection. Objection overruled. Exception allowed.

A. This is the warrant of arrest I received from the assistant Secretary of Labor.

Q. This warrant of arrest, is this the next step after your report of the hearing is forwarded to Washington? A. It is. [62]

Mr. GORDON.—It may be considered all under the same objection before saved.

The COURT.—Yes.

A. And under that warrant you held another hearing?

A. I held a regular hearing under the warrant of arrest, under the immigration law.

Q. And what was your finding?

Mr. GORDON.—Same objection; same ruling; exception allowed.

A. That they didn't have the right to enter the United States and recommended that a warrant of deportation be issued.

Q. And did you receive a warrant of deportation?

A. I did receive a warrant of deportation through the mail, in the regular channel.

Mr. MOODIE.—Offer that in evidence.

Mr. GORDON.—Objected to as being immaterial.

Q. This warrant of deportation is the next step after the warrant of arrest and hearing?

A. It is.

Mr. MOODIE.—I offer them both in evidence.

Mr. GORDON.—I make the same objection,—incompetent and not the best evidence. Objection overruled; exception allowed.

Q. At the time of those hearings did the Chinese present any chopk chees or certificates entitling them to be in the United States? Objected to; objection overruled; exception allowed.

A. They did not. In answer to my question to the four if they had any authority to be in the United States they said they hadn't, each and every one.

Mr. GORDON.—I move to strike the answer. Motion denied. Exception allowed.

Q. What is the present status of these Chinese, in regard to what is going to be done?

Mr. GORDON.—Objected to as calling for a conclusion.

The COURT.—Objection overruled. Exception allowed.

A. They are under order of deportation to China.

[63]

6th. That the evidence adduced on behalf of the plaintiff is insufficient to support the verdict of the jury or the judgment of the Court.

7th. That the evidence adduced on behalf of the plaintiff is insufficient to show or prove that the Chinese persons referred to in the indictment and in the evidence were not lawfully entitled to enter or be or remain in the United States.

8th. That the Court erred in not sustaining defendant's motion for a directed verdict, or for judgment *non obstante veridicto,* for the reason that the

names of the Chinese persons referred to in the indictment and in the evidence were known to the United States district attorney and to the grand jury previous to the return of the said indictment, and such names were not set forth in said indictment.

9th. That the Court erred in denying defendant's motion for judgment *non obstante veredicto.*

10th. That the Court erred in denying defendant's motion for a new trial.

11th. That the Court erred in denying defendant's motion for arrest of judgment.

12th. That the Court erred in pronouncing judgment against the defendant.

WHEREFORE, said defendant and plaintiff in error prays that the judgment of said Court be reversed, and that the Court be directed to sustain defendant's said motions, or either of them.

GORDON & EASTERDAY,
Attorneys for Defendant. **[64]**

Service of the within Assignment of Errors by delivery of a copy to the undersigned is hereby acknowledged this 30th day of Nov. 1915.

MOODIE,
Asst. U. S. Attorney.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. **[65]**

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Bond [on Writ of Error].

We, Harry Anderson, Wm. Conrad, Geo. O. Kelson, W. L. Ross, W. B. McElroy, V. J. McGrath and G. J. Heitz, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of five thousand dollars lawful money of the United States of America, to be levied on our, and each of our goods, chattels, lands and tenements upon this condition;

Whereas the said Harry J. Dahl has sued out a writ of error from the judgment of the District Court of the United States for the Western District of Washington, Northern Division, in the case in said court wherein the United States of America is plaintiff and the said Harry J. Dahl is defendant for a review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Now, if the said Harry J. Dahl shall appear and surrender himself in the District Court of the United States for the Western District of Washington, Northern Division, on and after the filing in the said District Court of the mandate of the said Circuit Court of Appeals, and from time to time thereafter

as he may be required to answer any further proceedings and abode by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit and not depart from said District Court without leave thereof then this obligation shall be void; otherwise to remain in full force and virtue. Witness our hands and seals this 1st day of July, 1915. **[66]**

HARRY ANDERSON.
GEO. O. KELSON.
W. B. McELROY.
H J. DAHL.
WM. CONRAD.
W. L. ROSS.
V. J. McGRATH.
G. J. HEITZ.
Everett, Wn. **[67]**

United States of America,
Western District of Washington,
Northern Division,—ss.

Harry Anderson, each being first duly sworn, each on oath does say: I am a resident of Pierce County, Washington, and am worth the sum of $2,000.00, in separate property, to wit: E. ½ Lot 24 and Lot 25, Block 5, Fletcher Heights Addn. to Tacoma, Washn., within this State over and above all debts and liabilities and exclusive of property exempt from execution.

HARRY ANDERSON.

Subscribed and sworn to before me this first day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Notary Public in and for the State of Washington,
Residing at Seattle. **[68]**

United States of America,
Western District of Washington,
Northern Division,—ss.

Wm. Conrad.

Each being first duly sworn each on oath does say: I am a resident of Pierce County, Washington, and am worth the sum of $3,500.00, in separate property —Lots 9 and 10, Block 16, McKinley Park Addn. to Tacoma, Wash., and 19 acres Canyon Co., Idaho, within this State over and above all debts and liabilities and exclusive of property exempt from execution.

WM. CONRAD.

Subscribed and sworn to before me this first day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Notary Public in and for the State of Washington,
Residing at Seattle. **[69]**

United States of America,
Western District of Washington,
Northern Division,—ss.

George O. Kelson, being first duly sworn, on oath says: I am a resident of Pierce County, State of Washington, and am worth the sum of four thousand dollars in separate property, to wit: Interest in three lots at 6815 Park Avenue, Tacoma, and West

half of Block 16, Harriman's Addition to Warrenton, Clatsop County, State of Oregon, over and above all debts and liabilities and exclusive of property exempt from execution.

GEO. O. KELSON.

Subscribed and sworn to before me, this 1st day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Notary Public in and for the State of Washington,
Residing at Seattle. **[70]**

United States of America,
Western District of Washington,
Northern Division,—ss.

W. L. Ross, ———, each being first duly sworn, each on oath does say: I am a resident of Pierce County, Washington, and am worth the sum of $2,000 in separate property—Lots 1, 2, 3 and 4, Block 1, Bogle 1st Addn., Tacoma, Wash.—2 Tide flat lots in Tacoma, within this State over and above all debts and liabilities and exclusive of property exempt from execution.

W. L. ROSS.

Subscribed and sworn to before me this first day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Notary Public in and for the State of Washington,
Residing at Seattle. **[71]**

United States of America,
Western District of Washington,
Northern Division,—ss.

W. B. McElroy, and ———, each being first duly

sworn, each on oath for himself does say: I am a resident of Snohomish County, Washington, and am worth the sum of $2,000, in separate property, to wit, Lots 13 and 14, Block 450, in Everett, Wash., within this state over and above all debts and liabilities and exclusive of property exempt from execution.

W. B. McELROY.

Subscribed and sworn to before me this 1st day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Deputy Clerk U. S. District Court. [72]

United States of America,
Western District of Washington,
Northern Division,—ss.

V. J. McGrath, ———, each being first duly sworn, each on oath does say: I am a resident of King County, Washington, and am worth the sum of $1,000, in separate property, to wit, Lot 6, Block 4, H. S. Turner Park Addn. to Seattle, within this State over and above all debts and liabilities and exclusive of property exempt from execution.

V. J. McGRATH.

Subscribed and sworn to before me this first day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Notary Public in and for the State of Washington,
Residing at Seattle. [73]

United States of America,
Western District of Washington,
Northern Division,—ss.

G. J. Heitz, ———, each being first duly sworn,

each on oath does say: I am a resident of Pierce County, Washington, and am worth the sum of $2,000, in separate property, Lots 3, 4 and 5, Block 6, Miller Lindahl's Addn. to Tacoma, within this State over and above all debts and liabilities and exclusive of property exempt from execution.

G. J. HEITZ.

Subscribed and sworn to before me this first day of July, A. D. 1915.

[Seal] EDWIN P. WHITING,
Notary Public in and for the State of Washington,
Residing at Seattle.

Examined, and approved this first day of July, 1915.

WINTER S. MARTIN,
Asst. U. S. Attorney.

Approved this 1st day of July, 1915.

JEREMIAH NETERER,
United States District Judge.

[Indorsed]: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 1, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [74]

[Order Directing Transmission of Original Exhibits to Appellate Court.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Upon stipulation of the plaintiff and defendant in the above-entitled cause, it is hereby ordered that the clerk of this court transmit to the United States Circuit Court of Appeals for the Ninth Circuit, as part of the record herein, all the exhibits introduced in evidence at the trial hereof in lieu of printed copies thereof.

Done in open court this 30th day of November, 1915.

JEREMIAH NETERER,

Judge.

O. K.—A. MOODIE,

Asst. U. S. Attorney.

[Indorsed]: Order to Transmit Exhibits. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [75]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2976.

HARRY J. DAHL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error [Copy].

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America: To the Honorable Judge of the District Court of the United States for the Western District of Washington:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, as plaintiff, and Harry J. Dahl, as defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the

State of California, on the 29th day of December, 1915, next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS: The Honorable EDWARD D. WHITE, Chief Justice of [76] the United States of America, this 30th day of November, 1915.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington.

Allowed this 30th day of Nov., 1915, after plaintiff in error had filed with the clerk of this court with his petition for a writ of error his assignment of errors.

JEREMIAH NETERER,
Judge of the District Court of the United States for the Western District of Washington.

Service of the within Writ by delivery of a copy to the undersigned is hereby acknowledged this 30th day of Nov., 1915.

A. MOODIE,
Asst. Attorney for U. S.

[Indorsed]: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [77]

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Citation [on Writ of Error—Copy].

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, on the 29th day of December, 1915, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Harry J. Dahl is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington this 30th day of Nov. 1915.

[Seal] JEREMIAH NETERER,

Judge.

Service of the foregoing citation and recipt of a copy thereof is hereby admitted this 30th day of November, 1915.

A. MOODIE,
Assistant United States Attorney. **[78]**

[Indorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. **[79]**

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY J. DAHL,
Defendant.

Stipulation as to Record.

It is hereby stipulated that the following designated papers comprise all the papers, exhibits and other proceedings which are necessary to the hearing of this cause upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and that none but such papers need be included in the records of said court:

Indictment.
Demurrer.
Order Overruling Demurrer.
Arraignment and Plea.
Verdict.

Judgment and Sentence.
Motion for New Trial.
Order Denying Motion.
Opinion.
Bond.
Order Continuing Bond.
Stipulation Extending Time to File Bill of Exceptions.
Order Extending Time to File Bill of Exceptions.
Stipulation and Order Substituting Copies for Original Exhibits.
Bill of Exceptons.
Order Settling Bill of Exceptions.
Petition for Writ of Error.
Assignment of Errors.
Supersedeas Bond.
Order Allowing Writ of Error.
Order as to Exhibits.
Stipulation as to Record.
Writ of Error.
Citation.

That the original exhibits herein may be attached to the record by the clerk and transmitted to the Circuit Court of Appeals and same need not be printed.

ALBERT MOODIE,
Assistant United States Attorney.
GORDON & EASTERDAY,
Attorneys for Defendant. [80]

We waive the provisions of the act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals

for printing as provided under rule 105 of this court.

GORDON & EASTERDAY,
Attys. for Deft. Dahl.

[Indorsed]: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [81]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY J. DAHL,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 81 typewritten pages, numbered from 1 to 81, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on writ of error therein, in the United States Circuit Court of Appeals for the Ninth

Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. **[82]**

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (sec. 828, R. S. U. S.), for making record, certificate or return, 144 folios at 15c.	$21.60
Certificate of Clerk to transcript of record—4 folios at 15c.	.60
Seal to said certificate	.20
Certificate of Clerk to Original Exhibits—3 folios at 15c.	.45
Seal to said certificate	.20
	$23.05

I hereby certify that the above cost for preparing and certifying record amounting to $23.05 has been paid to me by Messrs. Gordon & Easterday and E. C. Macdonald, attorneys for plaintiff in error.

I further certify that I hereto attach and herewith

transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 20th day of December, 1915.

[Seal] FRANK L. CROSBY,
Clerk U. S. District Court. **[83]**

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2976.

HARRY J. DAHL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error [Original].

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America: To the Honorable Judge of the District Court of the United States for the Western District of Washington:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, as plaintiff, and Harry J. Dahl, as defendant, a manifest error hath happened, to the great damage of the said defendant,

as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 29th day of December, 1915, next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United State, should be done.

WITNESS: The Honorable EDWARD D. WHITE, Chief Justice of [84] the United States of America, this 30th day of Nov., 1915.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington.

Allowed this 30th day of Nov., 1915, after plaintiff in error had filed with the clerk of this court with his petition for a writ of error his assignment of errors.

JEREMIAH NETERER,
Judge of the District Court of the United States for the Western District of Washington. [85]

MOODIE,
Asst. Attorney for U. S.

[Endorsed]: No. 2976. In the District Court of the United States, for the Western District of Washington, Northern Division. United States of America v. Harry J. Dahl, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

Service of the within writ by delivery of a copy to the undersigned is hereby acknowledged this 30 day of Nov. 1915. **[86]**

United States District Court, Western District of Washington, Northern Division.

No. 2976.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY J. DAHL,

Defendant.

Citation [on Writ of Error—Original].

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, on the 29th day of December, 1915, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Harry J. Dahl is plaintiff in error, and the United

States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this 30th day of Nov., 1915.

[Seal] JEREMIAH NETERER,
Judge.

Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 30th day of November, 1915.

MOODIE,
Assistant United States Attorney. [87]

[Endorsed]: No. 2976. In the District Court of the United States, for the Western District of Washington, Northern Division. United States of America, vs. Harry J. Dahl, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [88]

[Endorsed] No. 2724. United States Circuit Court of Appeals for the Ninth Circuit. Harry J. Dahl, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received December 22, 1915.

F. D. MONCKTON,
Clerk.

Filed December 30, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY J. DAHL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2724.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

M. J. GORDON and
J. H. EASTERDAY,
Attorneys for Plaintiff in Error.
National Realty Bldg., Tacoma, Wash.

The Bell Press, Printers

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY J. DAHL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2724.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

By an indictment found and returned in the United States District Court for the Western District of Washington, Northern Division, on the 19th day of March, 1915, the plaintiff in error and one William A. McGee were charged with conspiring together, "and together and with divers

other persons to the said grand jurors unknown to commit an offense against the United States, to-wit, to violate section eleven of the Act of May 6, 1882, as amended and added to by act of July 5, 1884, in this that it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly and unlawfully bring and cause to be brought into the United States and into the Northern Division of the Western District of Washington in said United States from the Province of British Columbia in the Dominion of Canada, by land, certain Chinese alien persons not lawfully entitled to enter the United States, and not entitled to be or remain in the United States at all, and it was further the object and purpose of the said conspiracy to wilfully and knowingly aid and abet the bringing of said Chinese aliens into the United States by land from the Province of British Columbia aforesaid; they, the said Chinese alien persons, not being lawfully entitled to be or remain in the United States at all; all in violation of the said mentioned Act." The indictment contains three counts and sets forth seventeen overt acts, which are alleged to have been done in pursuance of and to perfect the object of said unlawful conspiracy. (Tr. pp. 1-13). To this indictment, the plaintiff in error interposed his separate demurrer upon the ground that the matters and thing alleged therein do not constitute

any offense against the laws or sovereignty of the United States. (Tr. p. 18). The demurrer was overruled. (Tr. p. 19). Thereafter, on June 15, 1915, the case came on for trial before the Honorable Jeremiah Neterer presiding and a jury duly empaneled. Upon application of the Government, a separate trial as to the plaintiff in error, Dahl, was ordered.

The plaintiff in error seasonably objected to the introduction of any evidence upon the ground, "That the indictment nor any count thereof does not state facts sufficient to constitute any offense or crime against the United States", which objection was overruled and exception allowed. (Tr. p. 36). Evidence was introduced by the Government tending to show *inter alia* that on the night of February 23rd, 1915, Dahl and McGee, together with four Chinamen, were arrested at a point in the Northern Division of the Western District of Washington, near the international boundary line. They were in an automobile driven by McGee. (Tr. pp. 36 & 37). That thereafter the Chinamen were given the customary hearing and examination under the imigration laws and found to be not entitled to enter the United States and a warrant for their deportation had been issued. (Tr. pp. 36-41). The Government also produced the Chinamen, who testified that they were born in China, had never before been in the United States and were not en-

titled to be or remain therein. (Tr. pp. 46 & 47). This evidence was all received over repeated objections on the part of Dahl and, together with co-related evidence also objected to, is hereinafter in this brief set forth in detail and for the sake of brevity is here omitted. When the Government rested its case Dahl requested the Court to direct a verdict in his favor urging both the insufficiency of the indictment and also of the evidence. His motion was denied and exception allowed. (Tr. p. 42). No evidence was offered on behalf of Dahl and on June 4, the jury returned a verdict finding him guilty on all three counts. (Tr. p. 20). Thereafter he moved for judgment *non obstante veredicto* and in the alternative for a new trial, the latter motion being predicated in part upon the following grounds: Error in law occurring at the trial and excepted to at the time. (Tr. p. 21). Both of these motions were denied. (Tr. p. 23). And on July 1st the defendant was sentenced to imprisonment in the United States Penitentiary at McNeil's Island for the term of fifteen months on each count, to run concurrently. (Tr. p. 29). From that judgment the case is brought to this Court by writ of error. (Tr. p. 80 & 81).

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling the demurrer of the defendant to the indictment, and holding that the same stated facts sufficient to constitute a crime against the United States.

II.

The Court erred in holding and deciding over the objection of the defendant that said indictment was sufficient as a matter of law to permit the introduction of evidence thereunder against the defendant, and permitting over the objection of defendant evidence to be introduced thereunder.

III.

The Court erred in denying defendant's motion for a directed verdict in his favor on each of the counts of said indictment.

IV.

The Court erred in permitting the introduction of evidence in the following particulars:

"Q. What did you find in regard to each of these four Chinese?

MR. GORDON: Objected to as incompetent, irrelevant, immaterial and not the best evidence. Objection overruled; exception allowed.

A. I found the Chinese had never made application for admission and requested the Secretary of Labor to issue a warrant of arrest.

Q. In regard to this particular hearing, whether that was under the Chinese immigration law as to aliens?

MR. GORDON: I object to that as being incompetent, irrelevant and immaterial; objection overruled; exception allowed.

A. Under the immigration law.

Q. Now, this hearing you have just testified to was held under the immigration law prior to the time of the receipt of warrant of arrest?

MR. GORDON: I object to that as immaterial and not the best evidence; objection overruled; exception allowed.

A. Yes, sir. The preliminary hearing on which I based my application for warrant of arrest and which warrant was received in due course of call.

Q. I show you paper, which I will ask be marked Plaintiff's Exhibit 3, and ask you if that is the warrant of arrest you received in this case?

MR. GORDON: Same objection. Objection overruled. Exception allowed.

A. This is the warrant of arrest I received from the assistant secretary of labor.

Q. This warrant of arrest, is this the next step after your report of the hearing is forwarded to Washington?

A. It is.

MR. GORDON: It may be considered all under the same objection before saved?

THE COURT: Yes.

Q. And under that warrant you held another hearing?

A. I held a regular hearing under the warrant of arrest, under the immigration law.

Q. And what was your finding?

MR. GORDON: Same objection; same ruling; exception allowed.

A. That they didn't have the right to enter the United States and recommended that a warrant of deportation be issued.

Q. And did you receive a warrant of deportation?

A. I did receive a warrant of deportation through the mail, in the regular channel.

MR. MOODIE: Offer that in evidence.

MR. GORDON: Objected to as being immaterial.

Q. This warrant of deportation is the next step after the warrant of arrest and hearing?

A. It is.

MR. MOODIE: I offer them both in evidence.

MR. GORDON: I make the same objection—incompetent and not the best evidence. Objection overruled; exception allowed.

Q. At the time of those hearings did the Chinese present any chop chees or certificates entitling them to be in the United States? Objected to; objection overruled; exception allowed.

A. They did not. In answer to my question to the four if they had any authority to be in the United States they said they hadn't, each and every one.

MR. GORDON: I move to strike the answer. Motion denied. Exception allowed.

Q. What is the present status of these Chinese, in regard to what is going to be done?

MR. GORDON: Objected to as calling for a conclusion.

THE COURT: Objection overruled. Exception allowed.

A. They are under order of deportation to China."

V.

The Court erred in not sustaining defendant's motion for a directed verdict, or for judgment *non obstante veredicto*, for the reason that the names of the Chinese persons referred to in the indictment and in the evidence were known to the United States district attorney and to the grand jury previous to the return of the said indictment, and such names were not set forth in said indictment.

VI.

The Court erred in denying defendant's motion for judgment *non obstante veredicto*.

VII.

The Court erred in denying defendant's motion for a new trial.

VIII.

Insufficiency of the evidence to support the verdict or judgment.

ARGUMENT.

The errors assigned present but two principal questions, which may be stated, as follows:

First—Is the indictment sufficient to charge a conspiracy under section 37 of the Criminal Code (R. S. Sec. 5440)?

Second. Did the Court err in permitting certain evidence set forth in the assignment?

If these are resolved against the plaintiff in error, then we ask consideration of the further question which relates to the fifth assignment of error, namely,

Third. Did the Court err in denying our several motions, viz.: For a directed verdict, for judgment *non obstante veredicto*, to arrest judgment or in the alternative for a new trial?

SUFFICIENCY OF THE INDICTMENT.

It will be observed that in all three counts of the indictment, it is alleged that the purpose of the conspiracy was "To * * * bring and cause to be brought into the United States * * * *certain Chinese alien persons* not lawfully entitled to enter, etc." The indictment does not aver that the persons, so to be brought in, were unknown to the grand jurors and the language of the indictment excludes the theory that the conspiracy contemplated bring-

ing in all or divers and sundry Chinamen who might be desirous of entering. On the contrary, it alleges that the purpose was to bring in "certain Chinamen", from which it may be pre-supposed that the names of the precise persons which the conspiracy contemplated should be brought in were known. Proceeding on that assumption, we submit that under the rule of certainty required in indictments the names of the Chinamen should have been set forth in the indictment.

United States v. Simmons, 96 U. S. 360.

United States v. Britton, 108 U. S. 199.

Petebone v. United States, 148 U. S. 197.

In this respect the indictment differs from that in the case of *Wong Din v. United States*, 35 Federal 702, wherein it was alleged that the Chinese persons were unknown to the Grand Jurors and where this Court at page 705 said: "These things, if unknown, could not be more clearly stated."

DID THE COURT ERR IN ADMITTING CERTAIN EVIDENCE SET FORTH IN THE ASSIGNMENT OF ERRORS?

It will be noticed that nowhere does the indictment charge that any Chinamen were actually brought into the country. There are seventeen overt acts set forth as having been committed in effecting the purpose of the conspiracy, but, neither by direct statement nor by any possible inference

can it be gathered from the indictment that the purpose of the conspiracy was consummated by the actual bringing in of any Chinamen. It will, of course, be conceded that under Section 37 (R. S. 5440) it is essential to a good indictment not only that a conspiracy is formed but that some overt act is accomplished to effect it.

Hyde v. United States, 225 U. S. 347.
United States v. Hirsch, 100 U. S. 34.
Hyde v. Shine, 199 U. S. 72.

And since, as, neither in its formal parts, nor in any overt act set forth, does the indictment charge the bringing in of these Chinamen, we submit it was grossly prejudicial to permit the Government to introduce the evidence covered by the assignment.

Williamson v. United States, 207 U. S. 425.

How could any counsel after reading the indictment in the case at bar anticipate that evidence of the character here introduced would be given? If its reception was error, then it is inconceivable to suppose it was anything but prejudicial error. The Chinamen were brought into Court, they were shown to have been arrested with the defendant; that they had just been piloted across the international boundary line; that they had been examin-

ed under the immigration laws and found they were unlawfully in the United States and that a warrant for their deportation had been issued. Whatever doubts respecting defendant's guilt the jury may have entertained up to the time that this evidence was received would at once be set at rest in its contemplation.

THE JUDGMENT SHOULD HAVE BEEN ARRESTED, OR, AT LEAST, A NEW TRIAL AWARDED.

In the course of the trial it was disclosed in the Government's evidence that four certain Chinamen had been actually brought into the country in pursuance of the conspiracy charged. That they were arrested along with Dahl and McGee, and thereafter had been examined agreeably to the rule and custom of the Immigration Office and at the time of the trial were being held for deportation. After this proof was in, by suitable motion for a directed verdict, for judgment *non obstante veredicto*, for arrest of judgment and for a new trial, the sufficiency of the indictment was again challenged as well as the sufficiency of the evidence to sustain a conviction. In the light of this evidence, it becomes clear that the names of the Chinamen *were known to the Grand Jurors*, hence, again adverting to the indictment, we are forced to the conclusion that they were not among the "unknown persons" who, together with

the defendants, joined in the conspiracy, and with this understanding, it is equally clear that the conspiracy becomes one impossible of consummation because lacking the consent of free, moral agents, without whose consent the crime contemplated would be impossible of commission. *United States v. Melfi*, 118 Fed. 899, *United States v. Crafton*, 4 Dillon 145 (Federal cases No. 14881), *Com. v. Barnes*, 132 Mass. 242. *In re Schurman*, 20 Pac. 277. So that the most that can be said is, that a conspiracy was formed between Dahl and McGee for the purpose of entering into a still further conspiracy, with other persons, the purpose of the latter conspiracy being to commit an offense against the immigration laws. A conspiracy to conspire to commit an offense is not an offense (Wharton's Cr. L. 11th Ed. secs. 203-5 & 1605), for manifestly, if one conspiracy may be fastened to another, they might be multiplied without end before the offense is reached. And since, in the light of the proof, the names of the Chinamen arrested along with Dahl and McGee *were known to the Grand Jurors*, it must be concluded that they were not the alleged "unknown persons" to the conspiracy charged. Therefore, in point of fact, the so-called conspiracy which was formed, was a mere futile act of preparation looking to a conspiracy which was thereafter to be formed.

For these reasons we think the judgment should have been arrested, or at least a new trial awarded.

Respectfully submitted,

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J. H. EASTERDAY,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY J. DAHL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2724

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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Seattle Legal News Print.

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STATEMENT OF THE CASE.

The plaintiff in error, Harry J. Dahl, was indicted with William A. McGee on the 19th day of March, 1915, for violation of Section 37 Penal Code, for conspiracy to violate Section 11 of the Chinese Exclusion Act, with the purpose and object of smuggling Chinese into the United States and aiding and abetting such smuggling.

The indictment contained three counts in the usual and ordinary terms charging conspiracy and describing the overt acts. The three counts are based upon separate conspiracies of as many different dates, charging a purpose to bring in "certain Chinese alien persons not lawfully entitled to enter the United States, and not entitled to be or remain in the United States at all." No names of the objective Chinese are stated.

Two overt acts are charged under Count I; seven under Count II; and eight under Count III. The errors assigned apply equally to all three counts, with the exception of number four, which applies only to Count III.

Count III is based upon the conspiracy of the 18th of February, 1915, in pursuance of which eight certain overt acts are alleged, involving the actual smuggling in of four Chinese; and it was regarding these eight overt acts that the evidence objected to as inadmissible was received.

The trial was had on June 3-4, 1915, during which the Court, upon objection to the admission of the evidence complained of, instructed the jury that they should only consider it with respect to the conspiracy charged in the indictment, and distinctly stated that the defendant was not on trial for smuggling the Chinese into the United States. The

bill of exceptions and transcript are silent upon this point. At the time of offering the evidence complained of, counsel for the United States distinctly stated that it was only offered as part of the res gestae and for the purpose of throwing light upon the acts of the defendants in connection with the conspiracy charged.

The evidence in the case, as shown by the transcript, discloses a close relationship between the two defendants extending over a period of some four months, during which they did many acts clearly showing the conspiracy charged. These facts cover matters extending over the period before the conspiracy was actually entered into and after the object was consummated.

The jury returned a verdict of guilty on all three counts.

ARGUMENT.

POINT I. SUFFICIENCY OF THE INDICTMENT.

Plaintiff in error attacks the sufficiency of the indictment on the ground that it does not aver that the names of the persons to be smuggled into the United States were unknown to the grand jurors, and that its language excludes the theory that the

conspiracy contemplated bringing in all or divers and sundry Chinamen who might be desirous of entering. This contention was presented to the presiding judge at the trial and has been ruled upon adversely in all its phases. (Transcript p. 24. Reported in 225 Fed. 909, *U. S. vs. Dahl*). It is clear from the language of the indictment, as pointed out by the court in its opinion, that the conspiracy was to bring in certain Chinese whom the conspirators might have in hand on the date the journey was to begin. It is difficult to conceive how the defendant could have been more directly informed of the elements of the offense than by the use of the language employed. This language is almost identical in letter with that used in

Wong Din vs. U. S., 135 *Fed.* 702.

which practice is favorably reflected in *Williamson vs. United States*, 52 *L. Ed.* 278. The object in criminal pleadings is to furnish the accused with such a description of the charge as will enable him to make his defense, avail himself of his conviction or acquittal against any prosecution for the same cause, and inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction. The defendant is protected not only by the language used, but also by his right to show by evidence on a subsequent charge that he has

been in former jeopardy, and although the three specific charges of conspiracy may be termed general in their nature, to the extent that they contemplate the smuggling of unknown Chinese, the facts in both cases would clearly show former jeopardy.

Any doubt as to the sufficiency of a conspiracy indictment in the particulars mentioned, has long since been settled by the case of

Williamson vs. U. S., 207 *U. S.* 425, 52 *L. Ed.* 278.

This was a case of conspiracy to bring about the subornation of perjury. The defendant Williamson and others were charged with conspiring to procure certain persons *not named* to make false affidavit under the Timber and Stone Act that the affiant was not making entry for any other person or for the benefit of any other person. The case was reversed upon the ground that the affidavit in question was not required by any law, and that perjury or subornation could not therefore be predicated upon the making of such a false affidavit. The sufficiency of the indictment, however, was questioned and on all points raised was sustained. The indictment not only failed to set out the names of the persons who were procured to make the false affidavit, but there was *no allegation* that the names were *unknown*, to

the grand jurors. The Court in sustaining this indictment said,

> "These allegations plainly import and they are susceptible of no other construction than that the unlawful agreement contemplated a future solicitation of individuals to enter land * * * There is no reason to infer that the details of the unlawful conspiracy and agreement are not fully stated in the indictment, and it may therefore be assumed that the persons who were to be suborned, and the time and place of such subornation had not been determined at the time of the conspiracy * * * It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time or place of such suborning should have been agreed upon; and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment we think sufficiently set forth such purpose. The assignments of error which assail the sufficiency of the indictment are, therefore, without merit."

In 5 Ruling Case Law 1083, it is stated that in a charge of conspiracy, the particular crime which is the object thereof must be named, but need not be set out with the same particularity as in an indictment for the specific crime itself. This is the rule followed in a long line of conspiracy indictments:

Ching vs. U. S., 118 *Fed.* 540.

U. S. vs. Stevens, 44 *Fed.* 141.

U. S. vs. Wilson, 60 *Fed.* 890.

Pettibone vs. U. S., 37 *L. Ed.* 419.
Wong Din vs. U. S., 135 *Fed.* 702.
Williamson vs. U. S. 52 *L. Ed.* 278.

Furthermore, if the defendant conceived that he was at a disadvantage on account of the failure to name the Chinese who were to be smuggled into the United States, in pursuance of the conspiracy charged in any of the three counts, his remedy was by Bill of Particulars, which would afford him information upon that or any other doubtful matter.

Mounday vs. U. S., 225 *Fed.* 965.
Dunbar vs. U. S., 39 *L. Ed.* 390.
Bartell vs. U. S., 57 *L. Ed.* 583.
Rosen vs. U. S., 40 *L. Ed.* 606.
Durland vs. U. S., 40 *L. Ed.* 709.
U. S. vs. Bennett, F. C. 14571.

Under the above authorities, the indictment is clearly sufficient.

POINT II. ERROR IN ADMITTING CERTAIN EVIDENCE.

Under the premise that nowhere does the indictment charge that any Chinamen were actually brought into the country, and that neither by direct statement or possible inference can it be gathered

from the indictment that the purpose of the conspiracy was consummated by the actual bringing in of Chinamen, plaintiff in error alleges that the admission of the evidence set forth in the Transcript, page 39-41, was prejudicial error. This premise is born of the erroneous assumption that the admission of evidence of a consummated offense under an indictment charging conspiracy, is improper, therefore, the premise being erroneous, the argument and conclusion is erroneous.

In the very case cited in counsel's brief, *Williamson vs. United States*, 52 L. Ed. 278, the rule is laid down that evidence of other crimes is not prejudicial when it tends to show the crime charged and is properly limited on the trial by the judge. As stated before, the evidence complained of was offered and admitted under instructions by the Court to the jury that they should consider it only for the purpose of determining whether or not the conspiracy charged actually existed, and that the fact that the defendants might be guilty of an offense of smuggling in Chinese should not influence them in their verdict upon the conspiracy charge, except as showing preconcerted action and agreement. The evidence admitted was so inseparably linked with the overt acts charged in Count III, that it was eminently proper to admit the same.

In the consideration of conspiracy charges, the text writers and courts uniformly say that direct evidence of a conspiracy is the exception, and that it is usually proven by the acts of the conspirators which show a preconcert. They likewise hold that evidence of other offenses are admissible, especially when they are involved in the res gestae. As stated in

Clune vs. U. S., 40 *L. Ed.* 269.

> "Where a case rests upon circumstantial evidence much discretion is left to the trial court, and its ruling admitting such evidence will be sustained if the evidence admitted tends even remotely to establish the ultimate fact."

Wharton's Criminal Law 10*th Edition Sec.* 1401.

Second Bishop's New Criminal Law, Sec. 227 (2).

Russel on Crimes (1896 *International Edition*) 533.

Alkon vs. U. S., 163 *Fed.* 810.

Smith vs. U. S., 157 *Fed.* 721.

Davis vs. U. S., 107 *Fed.* 753.

Prettyman vs. U. S., 180 *Fed.* 30.

Robinson vs. U. S., 172 *Fed.* 105.

Pettibone vs. U. S., 37 *L. Ed.* 419.

U. S. vs. Breese, 173 *Fed.* 402.

U. S. vs. Cole, 153 *Fed.* 801.

U. S. vs. Richards, 149 *Fed.* 443.
U. S. vs. Heike, 57 *L. Ed.* 450.
Robinson vs. U. S., 172 *Fed.* 105.
Ryan vs. U. S., 216 *Fed.* 30.
U. S. vs. Rogers, 226 *Fed.* 512.
People vs. Molineux, 62 *L. R. A.* 193.
Thiede vs. Utah, 40 *L. Ed.* 242.

In the Heike, Richards, Davis, Robinson, Ryan and Rogers cases, supra, evidence of the consummated offenses, as well as other crimes, was received and held properly admitted. It is inconceivable that a conspiracy could be shown without admitting evidence of acts involving in most cases the consummated offense.

Section 37 of the Penal Code says:

> "If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do *any* act to effect the object of the conspiracy"

each of the parties to the conspiracy shall be deemed guilty.

In order to properly charge conspiracy, an overt act must be alleged. Under the statute, *any* overt act may be alleged; if it is permissible to allege any overt act, certainly an overt act involving the consummated offense may be both alleged and proved.

The government is not required to elect *one* of any number of overt acts and allege only that one. Under the authority of

Houston-Bullock vs. U. S., 217 *Fed.* 852.

evidence of overt acts other than those charged in the indictment is admissible. The evidence received in this case and relied upon as prejudicial error was part of the res gestae and indissolubly connected therewith. It bore materially upon the object and purpose of the conspiracy charged in Count III and under the authority of the Williamson case, 52 L. Ed. 291, was properly received. As stated in that case, as well as in the Clune case, supra, great latitude must be allowed in the reception of circumstantial evidence, the modern tendency both of legislation and of the decisions of courts being to give as wide a scope as possible to the investigation of facts without working injustice to the defendant.

Conspiracy is an exclusive offense, intended to punish a criminal scheming, and that scheming can only be shown by the acts of the conspirators, which unerringly direct our intelligence toward the preconcert. While proof of the conspiracy embraces in its details the consummated offense, in most instances, the latter is only a circumstance pointing to the former.

Britton vs. U. S., 27 *L. Ed.* 699.

In the case of *Houston-Bullock vs. United States*, 217 *Fed.* 852, it is held that evidence of any overt act in pursuance of the conspiracy is proper, together with all its incidental matters. The Court at page 858 says:

> "We find no error in the assignment that evidence was admitted of overt acts other than those which were pleaded in the indictment. No decision of the federal court is cited in which it has been held that in such a case the prosecution is limited to proof of the overt acts which are specifically charged."

and concludes by citing other cases showing the contrary, including *Heike vs. U. S.*, 57 L. Ed. 450. The Court further says:

> "That the language of Section 5440 indicates that Congress did not intend to change the common law rule (permitting evidence of all overt acts tending to prove the conspiracy) further than to make it essential to the offense described therein that there should have been at least one overt act to effect the object of the conspiracy."

In view of the above authorities, the reception of the evidence in regard to the actual smuggling of the Chinese, and of their alien status was entirely proper.

It has been held in

Steigman vs. U. S., 220 *Fed.* 67.

and *Heike vs. U. S.*, supra, that an indictment for conspiracy which shows in charging overt acts that a completed offense was committed, is not duplicitous.

Finally, if we admit for the sake of argument that the admission of the evidence complained of was error, an examination of the transcript will show that it was harmless error, and not prejudicial to the defendants, in the face of the evidence which had been previously admitted, since the record clearly shows a chain of facts and circumstances convincing beyond every reasonable doubt and the evidence complained of could have only been cumulative. Where the evidence, independent of that charged as erroneous, unquestionably supports the verdict of guilty, the error in admitting such items of merely cumulative evidence is not prejudicial.

As stated in Jones on Evidence, Vol. 5, 388, Sec. 896:

> "Where the exceptionable evidence is of little weight compared with the rest of the proof, and the whole clearly justifies the finding of the jury, a new trial will not be granted, but it must satisfactorily appear that the verdict must and ought to have been the same whether the questionable evidence was admitted or not."

This authority while largely treating of civil evidence, includes the criminal practice generally.

It is submitted that the rule stated is proper in this case, as the following cases show:

Stern vs. U. S., 193 *F.* 888.
Krause vs. U. S., 147 *F.* 442.
Thompson vs. U. S., 144 *F.* 14.
Calicchio vs. U. S., 189 *F.* 305.
Certiorari denied, 56 *L. Ed.* 1269.
Tubbs vs. U. S., 105 *F.* 59.
Brown vs. U. S., 142 *F.* 1.
Sawyer vs. U. S., 50 *L. Ed.* 972.
Pa. Co., vs. Ray, 26 *L. Ed.* 141.

In *Myers vs. U. S.*, 223 Fed. 919, the Circuit Court of Appeals for Second Circuit says:

> "Every element of the statutory offense has been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal."

It is respectfully submitted, in view of the above authorities and the final point that a conspiracy continues so long as any overt act is committed in furtherance of it, that the evidence complained of was properly admitted.

POINT III. ERROR IN DENYING MOTION FOR DIRECTED VERDICT; FOR JUDGMENT NON OBSTANTE VERDICTO; IN ARREST OF JUDGMENT; AND FOR A NEW TRIAL.

It is well settled that refusal to grant a motion for a new trial is not assignable error, unless an abuse of discretion appears:

Moore vs. U. S., 37. *L. Ed.* 996.
Wheeler vs. U. S., 40 *L. Ed.* 244.
Clune vs. U. S., 40 *L. Ed.* 269.

In the face of the evidence in the case, the overruling of motion for directed verdict was eminently correct, and no authority is needed to support the action of the court in that respect. The reason assigned as the court's error in not sustaining defendant's motion for judgment notwithstanding the verdict, that the names of the Chinese persons referred to in the indictment and evidence were known to the United States District Attorney and the grand jury previous to the return of said indictment and were not set forth in said indictment, is sufficiently covered by the treatment of Points I and II, and the government relies thereon.

The sufficiency of the indictment having been passed upon by the court and the evidence having been properly admitted, the denial of the motion in

arrest of judgment was correct, and is supported by above authorities.

The evidence in the case utterly fails to support the all but specious third point in the argument of counsel for plaintiff in error.

If any doubt should arise as to whether the defendant Dahl was charged with a conspiracy to conspire, or a plain conspiracy to commit an offense in violation of United States laws, we beg leave to refer to *Williamson vs. U. S.* 52 L. Ed. at page 290, paragraph number 1, as to the sufficiency of the indictment, which dissipates an elaboration of the argument insisted upon by plaintiff in error.

The action of the court in overruling the motion in arrest, and for a new trial, was correct.

The defendant was accorded a fair trial and the conviction should be sustained.

Respectfully submitted,

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ALBERT MOODIE,
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